SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 23

NEROY CARTER, PETITIONER,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. a] [Captions omitted]

[fols. 1-2]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

Civil Action No. 246-D

NEROY CARTER, Plaintiff,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, a Body Corporate, Defendant

COMPLAINT—Filed January 14, 1947

Jurisdiction is founded on diversity of citizenship and amount as well as the institution of this suit under the Federal Employers Liability Act (Title 45, Section 56, U. S. C. A.)

The plaintiff is a citizen and resident of the State of Florida, residing at Panama City in said state, and defendant is a railroad company chartered under the laws of the State of Alabama, with its principal place of business in Dothan, Houston County, Alabama, and in this Federal District and Division. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

II

The plaintiff alleges that on or about the 2nd day of February, 1946, at or near the plant of International Paper Company, Panama City, Florida, and while he was working as an employee of the defendant, which was then and there a common carrier railroad engaged in interstate commerce, and while the plaintiff was engaged under said employment in such interstate commerce, he was negligently injured by [fol. 3] the defendant in that the defendant or its servants, agents or employees, while acting within the line and scope of their employment by the defendant, negligently caused the plaintiff to be thrown from the bulkhead of a railroad car then and there being operated by the defendant, and plaintiff was severely injured as a proximate consequence

of said negligence of the defendant, its servants, agents or employees, while acting within the line and scope of their employment by the defendant.

The plaintiff avers that, at said time and place, he was employed as a trainman by the defendant on a railroad train of the defendant and as such trainman at said time and place, he was engaged in switching and spotting railroad cars on the various railroad tracks located at and in the plant of International Paper Company, Panama City, Florida, and, while the plaintiff was so engaged in and about his duties for the defendant as such trainman at said time and place, and while he was astride the bulkhead of a railroad car loaded with pulpwood which the plaintiff had just brought to a stop, said pulpwood consisting of green pine logs cut in lengths of approximately eight feet and being loaded on said car to the depth of about six feet, the engine and several other cars of the defendant comprising a part of said train of the defendant violently crashed into the other end of the car upon which the plaintiff was then situated as aforesaid, throwing the plaintiff from the bulkhead onto the floor of said car, the pulpwood having been likewise displaced in the car by the collision, and, after said car had stopped said displaced pulpwood rolling back upon and across the body of the plaintiff as he lay on the floor of said car.

The plaintiff avers that the defendant, its agents or employees, were negligent in this—that they negligently operated said engine and cars at an improper rate of speed at [fol. 4] said time and place; that they were careless and negligent in moving said engine and cars at said time and place without regard to proper signals and in violation of reasonably prudent and careful raolroad operating practice; that they were generally negligent, careless and reckless in and about the management, operation, maintenance and control of the engine and cars of the defendant at said time and place.

III

The plaintiff avers that as direct and proximate result of the negligence of the defendant, or of its agents and employees, the plaintiff suffered the following injuries and damages: The plaintiff was injured in and about his head, back and hips; he received an injury to his back including a nerve injury to his spinal column, and was permanently

injured and disabled. The plaintiff was caused to suffer greatly from shock and did suffer great physical pain and mental anguish, and will in the future continue so to suffer as a result of such injuries. He was rendered unable to pursue his normal vocation and he was put to considerable expense in and about the treatment of his injuries, and he will in the future be put to further additional expense, and his capacity to work and earn a living has been seriously and permanently impaired.

Wherefore, plaintiff claims of the defendant the sum of One Hundred Thousand ($100,000.00) Dollars as damages in which amount the plaintiff hereby demands judgment against the defendant together with costs.

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Plaintiff, Birmingham, Alabama.

[fol. 5] The plaintiff hereby demands a jury for the trial of this cause.

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Plaintiff.

Walter Bragg Smith
United States Marshal
Middle District of Alabama
Marshal's Docket 13 Page No. 15

Summons issued 1/14/47 and Marshal's Return thereon, Omitted from the printed Record, Pursuant to Rule 23 of this Court.

In United States District Court

[Title omitted]

Answer—Filed February 4, 1947

Comes the Defendant, Atlanta and Saint Andrews Bay Railway Company, a Corporation, and for answer to the complaint filed in this cause, says both separately and severally as follows:

First Defense

The complaint fails to state a cause of action or claim against this Defendant upon which relief can be granted.

Second Defense

(a) Defendant admits the allegations of Paragraph I of said complaint.

(b) Defendant admits that on or about the 2nd day of February, 1946, Plaintiff was in the employ of the Defend-[fol. 6] ant, a common carrier railroad, engaged in interstate commerce. Defendant denies that while Plaintiff was so employed by Defendant he was negligently injured by Defendant, its servants, agents or employees, and as is averred and set forth in Paragraph II of said Complaint. Defendant further denies that any injury or damage sustained by said Plaintiff at said time and on said occasion was the proximate consequence of the negligence of defendant, its servants, agents or employees, while acting within the line and scope of their employment by Defendant.

Defendant further denies that the engine and other cars of Defendant comprising a part of its train at the time and on the occasion complained of in Paragraph II of said Complaint violently crashed into the other end of the car upon which Plaintiff was then situated, throwing Plaintiff from the bulkhead of the car upon which he was riding on to the floor of said car, and injurying him in the manner and form therein specified and charged against this defendant.

Defendant further denies that it, its servants, agents, or employees negligently operated said engine and cars at an improper rate of speed at said time and place; that they were careless and negligent in moving said cars at said time and place without regard to proper signals and in violation of reasonably prudent and careful railroad operating practice; and that they were generally negligent, careless and reckless in and about the management, operation, maintenance and control of the engine and cars of Defendant at said time and place, all as is further charged and set forth against this Defendant in said Paragraph II of said Complaint.

c) Defendant further denies each and every allegation in Paragraph III of said Complaint.

[fol. 7] Third Defense

Defendant for further answer to said Complaint, avers that at the time and on the occasion complained of, Plaintiff

was guilty of negligence, which proximately contributed to his said injuries.

Wherefore, Defendant avers that Plaintiff should take nothing by this suit, and that it should be allowed to go hence with its usual costs in this behalf expended.

Alto V. Lee, III, Attorney for Defendant, P. O. Box 16, Dothan, Alabama.

I, Alto V. Lee, III, Attorney for the Defendant, Atlanta and Saint Andrews Bay Railway Company, a Corporation, hereby certify that I have this day mailed a copy of the foregoing answer to Messrs. Jackson, Rives & Pettus, Attorneys for Plaintiff, 818 Massey Building, Birmingham, Alabama.

This, 3rd day of February, 1947.

Alto V. Lee, III, Attorneys for Atlanta & Saint Andrews Bay Railway Company, a Corporation.

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERROGATORIES TO THE DEFENDANT—Filed March 22, 1947

Comes the plaintiff in the above styled cause and desiring the testimony of the defendant, propounds to it the following [fol. 8] interrogatories in accordance with the rules of civil procedure of the District Court of the United States.

1. Are you the defendant in this case.

2. Are you a corporation and, if so, state your exact corporate name and where you were incorporated.

3. Was the plaintiff in this case ever in your employ.

4. If you say that the plaintiff was in your employ, state when such employment commenced.

5. State by months the compensation paid by you to the plaintiff for the 12 months' period next preceding February, 1946.

6. State if you are a common carrier by railroad engaged in interstate commerce.

7. State if the plaintiff, as your employee, performed duties any part of which are in furtherance of interstate or foreign commerce.

8. State whether the plaintiff, as your employee, performed duties that in any way directly or closely and substantially effected interstate commerce.

9. State whether or not at the time that the plaintiff was hurt on February 2, 1946, he was engaged in moving cars consigned to points without the State of Florida.

10. Was the plaintiff injured while in your employ on February 2, 1946.

[fol. 9] 11. If the last preceeding question is answered in the affirmative, then state (a) at what time the accident occur-ed. (b) Where it occurred. (c) What the plaintiff was doing at the time. (d) On what train or engine he was working. (e) The description of the train or engine of whose crew he was a member. (f) The names of the other members of the train crew. (g) Was A. L. Whiddon the conductor, Tom Morrison, the foot board man and J. L. Grant the engineer and D. M. James the fireman. (h) Where was Conductor Whiddon when the plaintiff was hurt. (i) Where was Tom Morrison when the plaintiff was hurt. (j) Where was J. L. Grant when the plaintiff was hurt. (k) Where was D. M. James when the plaintiff was hurt.

12. State in detail how the accident occurred.

13. State if it is not a fact that pushing nine cars on the main line track at or near or in the plant of the paper mill company it was attempted to couple said cars with L & N car number 20042. (a) If that was not the number of said car with which the train at that time attempted to couple, what was its description and number.

14. What happened when the coupling was attempted.

15. Did the effort to make said coupling fail.

16. If you say it failed, what caused it to fail.

17. State if it is not a fact that when the lower end of the cut of cars then being pushed by your switch engine number three struck the upper end of L & N car number 20042, at

that time standing motionless on the track the automatic coupling failed to work and the coupling was not made.

[fol. 10] 18. Why did said coupling fail to work.

19. What part of said coupling failed to function.

20. What happened after said coupling failed to work.

21. What signal was then given by the plaintiff.

22. Did Trainman Morrison observe said signal.

23. Where was he standing at the time.

24. What did he do in respect to said signal.

25. Did he pass it on to the engineer.

26. Did the train come to a stop.

27. Where was said train when it came to a stop with respect to the switch of the wood yard track where said wood yard track leaves the main *time* of the defendant at or near or in the plant of the paper mill.

28. What happened to L & N car number 20042.

29. State if it is not a fact that was set in motion and began rolling down said main track and into the wood yard track.

30. State if the plaintiff did not set out in pursuit of it.

31. State if he did not catch it.

32. State if he did not board it on the lower end and set its brakes and bring it to a stop.

[fol. 11] 33. How many car lengths below the switch stand where the wood yard tracks join the main line was said L & N car number 20042 brought to a stop.

34. Had any signal been given in the meantime by the plaintiff.

35. Was said signal observed by Trainman Morrison.

36. If you state that it was observed by Trainman Morrison; where was he standing at the time.

37. What did he do in response to said signal.

38. Did he pass it on — the engineer.

39. Did the engineers receive it.

40. What did he do in response to it.

41. If you say that the engineer received a signal to come ahead, who gave it to him.

42. Where was the person who gave said signal to the engineer at the time said signal was made.

43. What did the engineer do in response to said signal.

44. Did he push the cut of cars forward.

45. At what rate of speed with the train moving at the time it made contact with L & N car number 20042, after the coupling had failed and when the plaintiff was hurt.

46. Was L & N car number 20042 loaded at the time.

[fol. 12] 47. With what was it loaded.

48. What was the weight of its load.

49. What happened to the load when the collision occur-ed.

50. State if it is not a fact that the plaintiff was thrown down from the lower bulkhead where the brakes on L & N car number 20042 were located on to the bed of said car.

51. State if it is not a fact that after this occur-ed the load on said L & N car number 20042 which had been shifted through the impact came back on top of the plaintiff.

52. Is Dr. Nixon of Panama City regularly retained by the defendant as its doctor and surgeon in that territory.

53. Is Dr. Ellis of Dothan, Alabama, the chief doctor and surgeon of the defendant.

54. Did these two doctors treat the plaintiff.

55. What diagnosis was made of the plaintiff's injuries by Dr. Nixon.

56. What diagnosis was made of the plaintiff's injuries by Dr. Ellis.

57. Did you ever have the plaintiff examined or treated by any doctors other than Doctors Ellis and Nixon and, if so, what are the names and addresses of said other doctors.

[fol. 13] 58. State if you did not have him examined or treated by a Doctor Edgar Fincher of Atlanta, Georgia.

(a) What diagnosis did Dr. Fincher make of the plaintiff's injuries. (b) Did he make a report of his examination of the plaintiff to the defendant. (c) If you answer that he did make a report, attach a copy of it as your answer to this interrogatory.

59. State if it is not a fact that Dr. Nixon has stated to you that the plaintiff in this case is suffering from a permanent injury to one of the nerves in his back, and that he is permanently incapacitated from ever again working as a railroad trainman.

60. State if it is not a fact that Dr. Ellis has stated to you that the plaintiff in this case is suffering from a permanent injury to one of the nerves in his back, and that he is permanently incapacit-ed from ever again working as a railroad trainman.

61. State if it is not a fact that Dr. Fincher stated to you that the plaintiff in this case is suffering from a permanent injury to one of the nerves in his back, and that he is permanently incapacitated from ever again working as a railroad trainman.

Jackson, Rives and Pettus, by J. K. Jackson, Attorneys for the Plaintiff.

STATE OF ALABAMA,
Jefferson County:

I, J. Kirkman Jackson one of the attorneys for the plaintiff in the above case do hereby certify that I have mailed a copy of the above and foregoing interrogatories to Honor-[fol. 14] able Alto Lee, III, attorney of record for the defendant at the Tri-State Building, Dothan, Alabama, postage prepaid, on this 21 day of March, 1947.

J. K. Jackson (J. Kirkman Jackson), Attorney for the Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWERS OF DEFENDANT TO INTERROGATORIES PROPOUNDED BY PLAINTIFF—Filed April 11, 1947

Comes the defendant in the above styled cause and for answers to the interrogatories heretofore propounded by plaintiff says as follows:

1. Yes.

2. Yes. Correct above—Houston County, Alabama.

3. Yes.

4. August 26th, 1943.

5. See attached sheet—Exhibit "A."

6. Yes.

7. Yes.

8. See No. 7.

[fol. 15] 9. Do not know as train was engaged in miscellaneous switching at the time and no record of such are kept.

10. Carter so alleges.

11. (a) Carter alleges around 9:05 P. M. (b) Bay Harbor. (c) Do not know. (d) His assignment was No. 3 switch engine. (e) Switch engine. (f) Engineer, J. L. Grant, Fireman, D. M. James, Conductor, A. L. Whiddon Trainman, T. E. Morrison. (g) A. L. Whiddon was conductor, T. E. Morrison was trainman J. L. Grant was engineer, D. M. James was fireman. (h) In gate watchman's shack. (i) Near main line performing assigned duty. (j) On engine performing assigned duty. (k) same as j.

12. Plaintiff alleges he fell off bulkhead at time coupling was effected.

13. Carter so alleges. (a) Already answered.

14. Coupling was missed.

15. Yes.

16. Do not know.

17. Already answered.

18. Do not know that coupler failed to work.

19. See 18.

20. See 18.

21. Carter gave stop signal.

[fol. 16] 22. Yes.

23. Do not know.

24. Repeated stop signal.

25. Yes.

26. Yes.

27. Approximately 230 feet from South end of train.

28. Started rolling.

29. Yes.

30. He so alleges.

31. Carter so states.

32. Carter alleges he caught blend of car and brought it to a stop.

33. Approximately 14 to 15 car lengths.

34. Yes.

35. No, as he was observing auto approaching railroad crossing performance of assigned duties.

36. See 35.

37. See 35.

38. See 35.

39. See 35.

[fol. 17] 40. See 35.

41. Plaintiff.

42. On L. & N. No. 20042 according to his statement.

43. Engineer obeyed signal and proceeded forward.

44. Yes.

45. From 2 to 3 miles per hour at decreasing speed.

46. Yes.

47. It was loaded with pulpwood.

48. Do not know.

49. Carter alleges load shifted.

50. Carter does not so allege.

51. Do not know Carter so alleges.

52. Yes, Nixon is our local Surgeon at Panama City, Florida.

53. Yes.

54. Yes.

55. Defendant declines to answer said interrogatory as same calls for incompentent, irrelevant, immaterial and hearsay testimony.

56. Same as 55.

[fol. 18] 57. Yes, Dr. E. F. Fincher, Atlanta, Georgia, and Dr. Robert P. Kelly, Atlanta, Georgia.

58. Already answered.

59. Defendant declines to answer said interrogatory as same calls for incompetent, immaterial, irrelevant and hearsay testimony.

60. Same as 59.

61. Same as 59.

Alto V. Lee, Attorney for Defendant.

Duly sworn to by T. L. Nichols. Jurat omitted in printing.

[fol. 19] I, Alto V. Lee, III, attorney for defendant in the above and foregoing cause hereby certify that I have this day mailed a copy of the foregoing answers to Messers Jackson, Rives and Pettus, Attorneys for plaintiff at 819 Massey Building, Birmingham 3, Alabama, the original of which has been filed with the clerk of this Honorable Court.

This 10th day of April, 1947.

Alto V. Lee, III, Attorney for Defendant.

EXHIBIT "A" TO ANSWERS

Month	Amount
1945	
February	187.62
March	299.62
April	287.62
May	281.00
June	250.76
July	318.78
August	307.84
September	315.44
October	214.57
[fol. 20] November	228.73
December	292.02
1946	
January	144.57
Total	3128.57

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed December 2, 1947

With leave of Court first had and obtained the plaintiff amends his complaint in the following particulars, to-wit:

1. By adding the following allegation to paragraph II, a the end thereof:

The plaintiff alleges that the activities in which he was engaged at the time he was thrown from the bulkhead of said railroad car as in this paragraph set forth were activities which he was directly caused to undertake by reason of the violation of the defendant of the provisions of the Federal Safety Appliance Act, in that the defendant hauled or permitted to be hauled or used on its line a car moving in Interstate Commerce not equipped with couplers coupling automatically by impact.

2. By deleting the phrase "Title 45, Section 56, USCA" in paragraph I, and in lieu thereof inserting the phrase" "and the Federal Safety Appliance Act."

3. By adding in paragraph III thereof, after the words "as a direct and proximate result," where said word- there [fol. 21] first appear, the following phrase "of said violation of the Federal Safety Appliance Act, or"

Jackson, Rives and Pettus, by Ed Pettus, Attorneys for Plaintiff.

DEFENDANT'S EXHIBIT No. 3

102. If a train should part while in motion, what are trainmen required to do? If possible prevent damage to the detached portion.

What signals must be given? Swing vertically in a circle across track.

May the detached portion be moved or passed until the front portion comes back? No.

What action should be taken on double track if you do not know opposite track is clear? Train must be stopped.

102 (a). What should be done with front portion of a train when practicable? The front portion should be side-tracked and engine return light for the detached portion.

D102. What must be done in case of sudden stops on double track when the cause is not known? The Fireman or head Brakeman must protect other track until known if unobstructed.

102 (b). What should be done when engine leaves a portion of its train on a main line under conditions which may [fol. 22] make it difficult to locate the standing portion? Two torpedoes place- a sufficient distance and a red light at head of detached portion.

DEFENDANT'S EXHIBIT No. 4

(17) Conductors shall see that the air brakes are coupled and operative on all locomotives and cars while switching in a yard and side tracks, on a grade, on the wharf at Bay Harbor and transfer at Dothan. Cars shall not be left standing on a grade with only the air-brakes set. The hand-brakes must also be set.

DEFENDANT'S EXHIBIT No. 5

102. If a train should part while in motion, trainmen must, if possible, prevent damage to the detached portions. The signals prescribed by Rules 12 (e) and 14 (f) must be given.

The detached portion must not be moved or passed until the front portion comes back, except under full protection. The enginemen and trainmen of the front portion must give the Train-parted signal to trains on an adjacent track. A train receiving this signal, or being otherwise notified that a train on an adjacent track has parted, must immediately reduce speed and proceed at restricted speed until the separated train is passed.

When a train is disabled or stopped suddenly by an emergency application of the air brakes or other causes, adjacent tracks as well as tracks of other railroads that [fol. 23] are liable to be obstructed must at once be protected until it is ascertained they are safe and clear for the movement of trains.

DEFENDANT'S EXHIBIT No. 7

14 (f) Train parted; to be repeated until answered by the signal prescribed by Rule 12 (e).

Answer to 12 (e).

IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence

APPEARANCES:

Messrs. Jackson, Rives & Pettus (Mr. Jackson and Mr. Pettus), of Birmingham, Alabama, For the Plaintiff.

Messrs. Alto V. Lee, III, and James Frazier, of Dothan, Alabama, For the Defendant.

It is agreed that this case be tried before eleven jurors. Mr. A. L. Whitten, a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Jackson:

Q. Please state your name?

A. A. L. Whitten.

Q. Where do you live?

A. Panama City, Florida.

Q. Are you an employee of the Atlanta and Saint Andrews Bay Railway Company?

A. Yes, sir.

[fol. 24] Q. What do you do for them?

A. I act as conductor.

Q. How long have you been working for them?

A. I began in March or April '37—1937.

Q. And have you worked for them ever since?

A. Yes, sir.

Q. Are you working for them now?

A. Yes, sir.

Q. Had you any railroad experience prior to the time you went to work for the Bay Line?

A. Yes, sir.

Q. How many years?

A. I went to work for tre Atlantic Coast Line in November '23.

Q. And you have been in the railroad business ever since?

A. Yes, sir, except short periods of time when I would be off.

Q. Now, Mr. Whitten, do you remember the occasion in the paper mill plant at Panama City when Mr. Carter, the plaintiff in this suit, was hurt?

A. Yes, sir.

Q. Were you in the train crew of which he was a member?

A. I was the conductor of that crew, yes.

Q. You were the conductor of that crew. Who else was in the crew.

A. Thomas Morrison was the trainman that was acting as footboard man, and Mr. Carter was what we call the field man, or swing man.

Q. Yes, sir.

A. And J. L. Grant was the engineman, and D. M. James was fireman.

Q. Yes, sir.

A. That made five men that made up the crew.

Q. Made up the crew. Now, I want to get down to the point where you had got almost in this paper mill with [fol. 25] this lot of cars and had your supper. You remember up to that event, don't you?

A. Well, I don't remember every movement, no.

Q. You remember when you got off to go to supper, don't you?

A. Yes, sir.

Q. And you remember what happened from there on out?

A. Well, after we had our lunch——

Q. (interposing): Well, just answer that yes or no.

A. Yes.

Q. I will ask you to look at this blackboard here and state whether or not that roughly pictures the layout of those tracks over which you were working at that time?

A. Well, yes, sir, it resembles it some.

Q. The tracks run out from the main line roughly as indicated here, do they not?

A. Yes.

Q. After you finished your lunch, I wish you would come over heere to this blackboard and indicate the movement which you then proceeded to undertake. Can you come over and do that?

A. Yes, I think I can.

The Court: Have to speak as loud as you can over there so the stenographer can hear you.

Witness: Somewhere right in here is what we call the Anita Cafe, and there is a road cross——

Q. Just go ahead. And from the time you came out and started up the main line with your light engine?

A. Well, we had lunch here in the cafe, and after finishing our lunch we came on up the main line, on up to this lead switch, we call it, here. Then we traveled through this [fol. 26] switch, traveled on down, and went in this track right on down into what we call No. 1 Woodyard.

Q. Before you leave that point: Was the pass track at the time occupied by any cars?

A. Yes, there were cars in this pass track.

Q. Where were the cars with reference to that shanty?

A. The cars—should be the shanty right here. These cars were just south of that shanty.

Q. All right. Now, you came on down with your light engine down to that woodyard No. 1. What did you do there?

A. Got some empty cars off of this track. One of these tracks is the outside or crane track. Inside track is what we call——

Q. Need not bother about that. What did you do with the cars you picked up there? In the first place, were they loaded or empty?

A. Empty.

Q. What did you do with them?

A. Came right back out the same track we went in.

Q. That's out the woodyard track and over track 3?

A. Yes, sir, on over the lead connection there onto the main line.

Q. Then what did you do?

A. After we had cleared the cars entirely out on the main line, so this switch can be turned, threw the switch and shoved those cars down the main line to in the clear here; what we call in the clear.

Q. Yes. Then what happened? Were they uncoupled from the engine?

A. Yes. Engine was detached.

Q. Engine was detached from the cars?

A. Yes, sir.

Q. Did you have any conversation at that point with Mr. Carter?

A. Yes, sir.

[fol. 27] Q. What was that conversation?

A. I told him what wood to get and take back into the woodyard.

Q. You say you told him what wood to get and take back into the woodyard?

A. Yes, sir.

Q. Explain what you mean by that?

A. Well we had gathered up some cars at Panama City, the log yard, we call it.

Q. Where were the cars at that time?

A. Well, I don't remember all the cars.

Q. Well, I mean the ones you told Mr. Carter to pick up. I am trying to shorten it as much as I can.

A. Where were these cars?

Q. Yes.

A. These were on the inside storage track and on the outside storage track.

Q. What did you tell Mr. Carter with respect to them?

A. Come on the inside storage track and get the L & N woodrack and set it on the main line in the clear.

Q. Well, clear of what?

A. Storage track.

Q. Then what else?

A. Then go back inside the storage and find a box car.

Q. Yes.

A. To get that box car to the outside and then he would find four flat cars and get those flat cars.

Q. Bring the original cars he had on and come out to the main line?

A. Yes, sir.

Q. That's what you told him?

A. He was supposed to pull these cars out.

Q. What did you tell him? To go in and get the box car?

A. Go in the yard.

[fol. 28] Q. What about the car you had previously put there? Did you give him any instructions about that?

A. Had to pick that up.

Q. After giving those instructions to Mr. Carter, what did you do?

A. I went to the shanty.

Q. What did you do in the shanty?

A. Made out some reports.

Q. I see. Now, while you were in the shanty, the train crew undertook to carry out the instructions you had given them?

A. Yes.

Q. What was the next thing that called your attention to the switching operation?

A. The train was moving by the shanty. There is a big flood light.

Q. Where is the floodlight in respect to the shanty?

A. It's over on this side.

Q. The northeast side?

A. Well, I reckon it's the northeast side.

Q. Assuming the blackboard heads north?

A. There is a pole has a big flood light on it and the workmen can watch for trespassers, which is not set forth.

Q. All right. What thing called your attention to the switch operation next?

A. I heard the train switching by the shanty and I saw it was going down in No. 3.

Q. How did you look out?
A. I looked through a window. A glass window.
Q. Then did you hear the couple?

Mr. Lee: We object to leading the witness.

Q. State there if you heard anything unusual?
A. When the train moved by, I told Mr. Carter I would go back in the woodyard with him, and had made prep-
[fol. 29] arations to come back and catch the engine. That's what I do, and intended to do.
Mr. Lee: We object to what he intended to do.
The Court: Yes: You can not state what you intended to do. You can testify what you did do.

Q. Just state what you did do.
A. The train moved in No. 3 when I was preparing to come out of the shanty, and I heard a bump or noise like a car couple. The train stopped momentarily and moved on and meantime I moved out of the Shanty, the engine come up, and got on the engine and rode on down in the woodyard.
Q. What happened down there?
A. I had instructed Carter and Morrison to place the wood in the woodyard, to couple up from down there and spotted the wood on the flat car, the wood on the crane track, and the box car of wood on the conveyor track.
Q. When did you first learn Mr. Carter had been hurt?
A. After they had placed the wood in the woodyard.
Q. How did you learn he was hurt?
A. Told me he was hurt.
Q. What happened then? What did you do with him?
A. I asked him if he was able to continue to work, where was he hurt, or anything like that, and he said——

Mr. Lee: We object. Conversation between him and Mr. Carter. Purely self-serving and not part of the res gestae at all.
The Court: Gentlemen I don't suppose that conversation would be admissable.

[fol. 30] Q. What did you do?
A. When Mr. Carter sat down, I sat down by him and had him pull off his shoe, and I saw—what I remember —the left foot appeared to be bruised, and I asked him

if he thought he could continue to work. Then he made mention about his back.

Mr. Lee: We renew our objection about it.
The Court: Yes.

Q. Did he make a statement about his back?

Mr. Lee: We object. Any statement would be sympathetic.
The Court: Sustain the objection. Did he work on?
Witness: I called an officer of the railroad and asked him if he would come and get Mr. Carter, that at that time he wasn't suffering any undue pain, nor was he losing any blood, and he said he would come.

Mr. Jackson:

Q. Did he complain of pain in his back?

Mr. Lee: We renew our objection. Self-serving declaration. Not part of the res gestae.
The Court: I believe I will overrule the objection to that.
[fol. 31] Mr. Lee: We except.

Q. You can answer it.
A. Yes. He made complaint of his back and here.
Q. You can sit down. If you had not gone in the shack, where would you have been with reference to this switching operation you have described?
Mr. Lee: We object. Conclusion of the witness; incompetent, irrelevant and immaterial.
Q. If you had not gone in the shack you just described, where would your duty have called for you to be in connection with that switching operation?

Mr. Lee: We object. Conclusion of the witness. Purely sympathetic.
The Court: If he knows what his duty would have been in connection with the switching operation, I will let him answer.
Mr. Lee: Except.

A. If I had not thought it necessary to make out these reports, I would not have gone into the shanty and would have stayed and helped with this operation.
Q. That would have been your job?

A. I would have been out, supervising the work, seeing they got the right car, checking into where they were doing their work, and seeing they got the car I wanted picked up.

[fol. 32] The Court: Can you say whether you would have directed it to have been done any different than it was?

Witness: No, sir. I would not have changed my instructions, because I thought that was the quickest and best way to get the wood.

Q. Mr. Whitten, if you had gone out there, not been in the shack, would you have been closer to L & N car 20042 at the time the coupling was attempted?

Mr. Lee: We object.

The Court: Such a question would be speculative.

Q. Would your duties have required you to be there, if you had not been in the shack?

A. Yes, sir.

Q. Assuming, Mr. Whitten, that this coupling failed to make, and L & N 20042 started on down and ran into lead one and thence to track 3, and you were standing there, what would you have done?

Mr. Lee: We object to that.

The Court: Sustain the objection.

Q. What were the duties of the other members of the car crew, assuming Mr. Carter was standing there, assuming the coupling did fail?

[fol. 33] Mr. Lee: We object. Calls for an unfounded conclusion on the part of this witness.

Mr. Jackson: No. I am going to prove the coupling failed.

The Court: I think you are asking there just speculative hypothetical questions. Sustain the objection.

Mr. Jackson: We except.

Q. Now, Mr. Whitten, the engineer on a switch operation of this sort, does he know where various cars are to be moved?

A. Where they are?

Mr. Lee: We object, unless it is confined to this particular operation.

Q. Does he know where particular cars are to be moved?

The Court: If you know, you can answer that.

A. No. I wouldn't think he would know.

Q. Does he know what is in the cars?

A. I wouldn't see how he could know, without someone told him.

Q. Does he know where cars are to be placed?

A. Not every time, no.

Q. How does he operate the train, the engineer? Does he do it in response to various signals which are given to him?

[fol. 34] A. Yes, sir.

Q. Who gives him those signals?

A. The various members of the crew.

Q. Are you familiar with the operation rules of the Atlanta and Saint Andrews Bay Railway Company?

A. I feel like I am familiar with them.

Q. Mr. Whitten, one other thing: You testified that when this switch No. 3 came out on the main line, next to your engine was that box car—that's right, is it not?—or that was the instructions that you gave?

A. Ask your question again.

Q. According to the instructions which you gave Carter, after he placed the L & N car 20042 on the main line he was supposed to go into the inside storage track and couple this box car?

A. Yes, sir.

Q. And then he was supposed to go to this outside storage track and couple up these log racks?

A. Yes, sir.

Q. That would have put the box car up next to the engine, would it not?

A. Yes, sir.

Q. Is a box car a big car?

A. Some of them are quite large. Some are not so large. Different sizes.

Q. Well, it is bigger than a wood rack?

A. You mean——

Q. Yes. Higher and broader?

A. I would say a box car is considerably higher than a wood rack, but wouldn't say it is quite as wide as a wood rack, loaded with wood; pulp wood.

Q. The box car being next the engine in the position I have just described in the question would have a tend-

ency to stand off the engineer's view looking south, would it not?

A. To cut off his view?

[fol. 35] Q. Yes.

A. The box car?

Q. Yes.

A. Well, you would hold over your head and look out the window.

Q. And the engineer is on the right side of the train?

A. Yes.

Q. Right side of the engine?

A. Yes.

Q. Now, assuming that one of the brakemen got on this train five car lengths ahead of the engine as it was coming down the main line on that day, and merely got up and sat on what I would call the southeast corner of that car, would he have been visible from that point, in your judgment, by the engineer?

Mr. Lee: We object. Speculating, and the witness testified at that point he was in the shanty and did not know.

The Court: Well, I guess he is familiar with the physical surroundings there. I believe I will let him answer that.

Mr. Lee: Except.

Q. State, from your judgment——

A. Ask your question.

Mr. Jackson: Read it.

Reporter: "Now, assuming that one of the brakemen got on this train five car lengths ahead of the engine as it was [fol. 36] coming down the main line on that day, and merely got up and sat on what I would call the southeast corner of that car, would he have been visible from that point, in your judgment, by the engineer?"

A. If he had set near enough to the edge of the car and kept his lantern out on the outside, the engineer could have seen his lantern. I don't say he could have seen the man, but he could have seen this electric lantern, if he had it outside of the wood.

The Court: He could have seen any signal that the man gave with the lantern?

Witness: Yes, sir.

The Court: You said he could see the lantern if he held it out?

Witness: If he had held it out to his side.

The Court: If he had held it out on the side?

Witness: If he didn't set it too far over into the material in the car, if he set on the corner of the car and kept his lantern, didn't put it down behind the bulkhead, or some wood, or something, and kept it up, the engineer could have seen it, I think.

Mr. Jackson:

Q. Could the engineer, coming down the main line here, with his engine headed south and with the engineer being [fol. 37] on the right side—could he have seen the lantern of a man on the bulkhead of a wood rack after he had gotten around the turn into the lead track?

A. Now,——

The Court: Seems to me like that's purely a hypothetical question.

Mr. Lee: We object.

The Court: There is no evidence to support it. Sustain the objection.

Mr. Jackson: We except.

The Court: Is that all for the witness?

Mr. Jackson: Just a minute, your Honor. Your Honor, we would like to get permission, after we have laid the predicate, to establish the hypotheses in some of these questions, to have the right to recall Mr. Whitten briefly.

The Court: If it is necessary, you can recall him.

Mr. Jackson: Yes, sir. That's all.

Mr. Lee: Did I understand you to state you would recall——

[fol. 38] Mr. Jackson: Yes.

Mr. Lee: Your Honor please, we would like to reserve our right to cross-examine him until after he recalls his witness.

The Court: I don't know he is going to recall him.

Mr. Jackson: I may not.

Cross-examination.

By Mr. Lee:

Q. In making the reports in the shack, you were in the performance of part of your duties as a trainman, were you not.

A. Yes, sir.

Q. That shanty is next to the pass track on his blackboard. This was during the night-time?

A. Yes, sir.

Q. What kind of cars were those on the pass track between the shanty and No. 3 track?

A. They were box cars.

Q. This was cold, winter time, in February, wasn't it?

A. Yes, sir.

Q. About nine o'clock at night, and the windows to that shanty were closed?

A. Yes, sir.

Q. Now, after you say you heard that noise, you continued to write momentarily before you got up and went out, did you not?

A. Well, began to make preparations to go out——

[fol. 39] Q. I mean, you continued? After you saw the train beginning to pass, you continued to write, you wrote some after you saw the train passing? You follow me?

A. I don't quite get your question.

Q. You recall you testified you saw the train?

A. Through the window.

Q. At the time you saw the cars coming by——

A. Speaking of the window?

Q. You saw it as it passed the shed?

A. Wood rack.

Q. That was the lead car?

A. I wouldn't be positive.

Q. You wouldn't be positive, but you did see it pass?

A. Yes, saw it.

Q. Then after you saw it pass, you continued to write before you got up and left?

A. Maybe I did, too, put down one or two more numbers of a car.

Q. That's what I mean: You continued fooling with your records before you ever took the records up and started out of that shanty?

A. The records I was making was on a clip board, and all I had to do was get up and leave the clip board there.

Q. To refresh your recollection, didn't you work a bit on, which was writing on your reports, after you saw this wood rack car passing there?

A. View a bit of it?

Q. I say, didn't you continue to write on your reports after you first saw this wood rack car passing there?

A. I don't know. I imagine I made one or two more notes.

Q. You gave a statement to the railroad?

A. Yes, sir.

Q. Do you have a copy of it?

A. Yes, sir.

[fol. 40] Q. Look at the copy, then, if you will, Mr. Whitten. Refresh your recollection there. All right. Read it down to there.

The Court: Gentlemen, you take up, it seems to me, a lot of time that bears very little significance in this case.

Mr. Lee: If the Court please, we think it will enter into it very materially on the speed of the train at a later point, develop some distances in the yard. That's the point we have in mind.

The Court: If he saw it pass, looks like he would have some judgment as to what speed it was moving.

Witness: According to my statement, I did do some more writing.

Q. After you saw it pass?

A. Yes, sir.

Q. I will ask you this: When this L. & N. 20042 was set on the main line, Carter set the car out there, he was in charge of that switch at that point?

A. Yes, he's the man; he is the swing man.

Q. He is the swing man, and he is the man that set that car out there before he went back in the inside and outside storage tracks?

A. I would not say he set it out by himself. He should have been back, assisting.

Q. He was instructed by you to set it down?

A. Yes. And ready to.

Q. All right. I mean he was the lead man on that car?

[fol. 41] A. Yes, sir. In one sense who had took my place.

Q. That's what I am talking about. While you were in there making reports in that shanty?

A. Well, it was my duty to make the reports.

Q. That's what I say. Mr. Whitten, after you left the office you came out and got on the engine of that train, did you not, and grabbed the hand rail on down in the woodyard?

A. Yes. Get on the back footboard of the engine.

Q. Didn't come to the cab, where Grant and James were?

A. Yes, sir.

Q. How far is it from that shed down to the woodyard?

A. How far is it?

Q. Your best judgment?

A. From the shanty?

Q. Yes.

A. It would be all right to give it to you in car lengths?

Q. Well, yes, sir.

A. Supposed to be forty-foot cars.

Q. All right.

A. Well, this No. 3 track we have reference to there used to hold 18 or 19 cars, in the clear, at each end, see, of the pass down there, before you get into this No. 1 woodyard track, and on down I would say about 9 or 10 more cars there. I'd say about 26 to 28 cars. Something like that.

Q. Before you arrive at this point down here in the woodyard?

A. Beg your pardon. Let me get there (at the blackboard). I believe I can give you a little closer figure on it.

Q. I mean from up here. The shanty is closer to the fence, where you come in first?

A. Yes.

[fol. 42] Q. Approximately two feet from it?

A. Two feet from the fence.

Q. You have what is called the woodyard down here, where you have got the conveyor track and crane track?

A. We used to run around cars in this pass track and could run 26 forty-foot cars in the pass track, that is, pull them in the pass track.

Q. Is it as much as a quarter of a mile from here?

A. You mean down here?

Q. No.

A. Starting here, where there was box cars——

Q. No. Where did you put the L. & N. car 20042?

A. Went in there over the track to this crane track.

Q. It went all the way——

A. No.

Q. When you went in on this point from where the crane track starts, how far is it, in your best judgment? Quarter of a mile, or half a mile, or what?

A. I believe it is approximately a quarter of a mile.

Q. Approximately a quarter of a mile. Now, you rode on down on the engine and that car was spotted and placed on this train track before you ever knew Neroy Carter was hurt?

A. Yes.

Mr. Lee: That's all.

Redirect examination.

By Mr. Jackson:

Q. Now, you sit up there just a minute. Mr. Whitten, are you familiar with the operating rules of the Atlanta and Saint Andrews Bay Railroad?

A. I feel like that I am.

[fol. 43] The Court: That question was asked him on direct examination.

Mr. Pettus: Was asked, but he changed before he answered it.

Q. Is this a copy of the rules in force and effect on February 2, 1946?

A. Yes, sir. That's our book.

Q. I will ask you to state whether or not there is a railroad operating rule No. 1011 which provides as follows with reference to the duties of enginemen: "They must take into consideration the fact that the lives of passengers and employes, as well as the property of the Company, are instructed to their care; and it is fully expected and required that they will not only attend to and obey all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. If, in switching, the signals are lost to view, stop must be made until signals can again be seen"? That's rule No. 1011?

A. We have that rule in our book.

Mr. Jackson: Yes. We offer that rule in evidence.
Mr. Lee: We have no objection.

The rule is marked Plaintiff's Exhibit No. 1 in the rule book.

Q. Now, assuming——

The Court: If you are going to start a long examination of this witness, we will take a recess until two o'clock.

[fol. 44] The Court then, at 12:30 P. M., recessed until 2:00 P. M.

Afternoon Session

12-2-1947

1:56 O'clock

The Court: Let's get along.
Mr. Pettus: We will excuse Mr. Whitten for the time being. We may recall him to substantiate a hypothesis.
The Court: All right.

Mr. T. E. Morrison, a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pettus:

Q. What are your initials?
A. T. E.
Q. T. B.?
A. T. E.
Q. T. E. Morrison, and you are employed by this defendant railroad company?
A. Yes, sir.
Q. Were you employed by it in February, 1946, when this accident happened involving Mr. Carter?
A. Yes, sir.
[fol. 45] Q. And what was your position at that time?
A. On that particular job I was working as footboard man.
Q. Footboard man. That was on the switch engine?
A. Yes, sir.

Q. And it was your place to work up in connection with the engine?

A. That's right.

Q. What was Mr. Carter's job? Was he employed by the same company at the same time?

A. Yes, sir.

Q. What was his job?

A. What we call field man.

Q. And sometimes referred to as swing brakeman?

A. Yes, sir.

Q. And here you were head brakeman?

A. That would be on the railroad.

Q. Where you were footboard man on the switch engine?

A. Yes, sir.

Q. And what kind of engine was it?

A. Diesel 906.

Q. Was a Diesel engine, but was it an engine especially for switching, or about the same as a road engine?

A. Use it for both.

Q. This was a road type of Diesel engine, wasn't it?

A. Well, they use it on the road, but they use it on the switching, too.

Q. This Diesel engine had a front and back—in other words, would go forward and reverse and come back? Front part we used to refer to as the cowcatcher, up ahead of it?

A. Yes, sir.

Q. Do you have a cowcatcher on the Diesel?

A. Well, it has a pilot out there, yes, sir.

Q. Do you remember the occasion when this L. & N. car 20042, I believe—whatever it was—the one involved—do [fol. 46] you remember when it was pulled out and carried down and spotted on the track? First it was moved down and spotted? Do you remember that occasion?

A. Yes, sir.

Q. That was the first m-vement of that car. Had the Diesel engine at that time picked up a box car?

A. No, had not at that time.

Q. It had not?

A. No.

Q. Did it later pick up a box car?

A. Yes, sir.

Q. Ahead of that box car you had a number of flat cars?

A. Yes, sir.

Q. And went to stop and did take another flat?

A. Yes, sir.

Q. And they had a Diesel with a box car next to the engine and flats later on?

A. Yes, sir.

Q. And in that condition, it headed down the main line?

A. Backed out.

Q. Backed down the main line?

A. Backing down to the main line.

Q. The cars were in front?

A. Oh, yes.

Q. In other words, the engine was backing. Did the engine, when it backed out on the main line, have these cars in front of it?

A. Yes, sir.

Q. Pulling back?

A. Yes, sir.

Q. The engine was backing, but the cars were ahead of the engine?

A. Yes, sir.

Q. And then when it got on the main line, with the cars in front of it, and the box car next to the engine, it pushed [fol. 47] these cars down to where this L. & N. 20042 was parked?

A. Yes.

Q. The car parked there, L & N. car, was supposed to be there with the brake on, where it was parked?

A. Well, Mr. Carter cut it off.

Q. He cut it off, but the railroad practice, would be there with the brake on?

A. Yes.

Q. They were supposed to be?

A. Yes.

Q. Where was Mr. Carter at that time?

A. Standing at the car.

Q. That 20042?

A. Yes, sir.

Q. Mr. Whitten, the conductor, had then left the train?

A. Yes, sir, in the shop.

Q. And when he left, the instructions were to the other men by Mr. Carter?

A. Yes, sir.

Q. And Mr. Carter, with Mr. Whitten over in the shanty, was to that extent giving the orders which the conductor would have given, if he had been there?

A. Yes, sir.

Q. When Mr. Carter was giving instructions about the train movement and train coming down and the L. & N. car, you say Mr. Carter was on this car?

A. I couldn't get over there.

Q. Did the train back on on this crossing?

A. On this crossing.

Q. Did you see his light over there?

A. Yes, sir.

Q. But you rode the engine?

A. I rode the box car.

Q. Then when it got down there, did the train come in contact with that L. & N. car?

A. Yes, sir.

[fol. 48] Q. Where were you at the time that happened?

A. I was on the Pledger crossing.

Q. On the Pledger crossing. Now, that's that crossing up yonder marked on that map, the Pledger crossing?

A. Yes, sir.

Q. You were off there on the Pledger Crossing, and which side of the track were you on?

A. I was on the west side of the track; on the engineer's side.

Q. The north is the top of the map, and you then left here? Is that right?

A. Yes, sir.

Q. When you left, where the word "Pledgers" is, you were on that side?

A. Yes, sir.

Q. You were right at Pledgers?

A. Yes, sir.

Q. Where was the L. & N. car parked? How far was it from Pledgers Crossing?

A. When we picked up some storage there and backed on the main line, he sent it down to Mr. Carter.

Q. You don't know just where it was parked?

A. No.

Q. When the train came down, were you looking at it? Did you see the train come in contact and attempt to make the coupling on the L. & N. car?

A. I saw it just before.

Q. Just before it made contact?

A. That's right.

Q. Did you continue to look at it?
A. No, sir. Several cars were coming down the road.
Q. You were watching the traffic on the road?
A. Yes, sir.
Q. And your attention was distracted by the traffic?
A. Yes, sir.
[fol. 49] Q. Did you hear when the coupling was made?
A. Heard when they come together.
Q. Did the train stop suddenly, or stop at all?
A. It stopped momentarily.
Q. It stopped momentarily?
A. Yes, sir.
Q. You could tell it was a momentary stop?
A. Yes, sir.
Q. Do you know whether it was going along? What was it doing?
A. The train had proceeded ahead.
Q. Train going on ahead?
A. Yes, sir.
Q. Could you tell whether the L. & N. car was ahead of it?
A. No.
Q. You could not tell if the L. & N. car was coupled, whether the coupling had been completed?
A. No.
Q. Could not tell?
A. No.
Q. What did you do?
A. Climbed up on a flat car.
Q. How far from the engine?
A. Four or five cars.
Q. How many cars were in front of you where this L. & N. car should have been on the train ahead of you?
A. About four.
Q. How many?
A. About four.
Q. Where did you get on this car?
A. I crawled up and got on the corner of the wood-rack.
Q. Was that the end of the car?
A. Yes, sir.
[fol. 50] Q. Was this on the opposite end of the engine?
A. No.
Q. It was on the end away from the engine?
A. No; further away from the engine.

Q. Further away from the engine. That's what I meant by "opposite."

A. Yes, sir.

Q. Now, this wood car you were on, you were on the front end of it and the bulk of the car was between you and the engine?

A. Yes, sir.

Q. In other words, the car was behind you?

A. Yes, sir.

Q. If this was the car, were you sitting up on the front end that way, or sitting turned north, this front end?

A. Near the corner.

Q. Near the corner?

A. Yes, sir.

Q. I will ask you to state whether or not from where you were sitting at that time the engineer, at his post, on that kind of an engine, could have seen your signal, if you had given a signal?

A. I would have to lean over.

Q. You would have to lean over?

A. Yes.

Q. Would you have to hold to the car and lean out about as far as you could, over the side?

A. You would not have to lean a-far over.

Q. What's that?

A. You would not have to lean a-far over.

Q. You would have to lean beyond the side of the car before you could give a signal?

A. Yes.

Q. Did you do that, or give any signal at all?

A. Didn't give any signal.

[fol. 51] Q. Where was your lantern? Do you know where it was sitting?

A. I don't know just where.

Q. Sitting down there somewhere about where you were sitting?

A. Maybe I had it in my hand.

Q. You might have had it in your hand or sitting on there with you? You just don't recall?

A. No.

Q. You did not give any signal?

A. No.

Q. At that time could you see Mr. Carter's light?

A. No.

Q. Had Mr. Carter at that time turned the curve? The curve went around the left side, going?

A. Yes, sir.

Q. And the engineer, of course, was over on the same side?

A. He was on the side I was on.

Q. At that time had Mr. Carter, the lead car Carter was on, turned the curve?

A. It evidently had.

Q. Evidently had. You didn't see any light or any signal from Mr. Carter at the time?

A. No.

Q. The only signal that you saw Mr. Carter give was when the first coupling was attempted, wasn't it?

A. Yes.

Q. And at that time he gave a slow signal to come back and make the coupling?

A. Slow signal ahead.

Q. Slow signal ahead, and you forwarded his signal to the engineer at that time?

A. They went ahead.

Q. You were around there watching traffic?

[fol. 52] A. Thought he had a safe coupling attempted, with reason to believe he had done it.

Q. Did you know where Carter was? Did you know he was on the lead car, that L. & N. car?

A. No.

Q. You didn't know it?

A. No.

Q. When they came in to this point, approaching the car, did your car, the one you were on, begin to turn around to the left?

A. Yes, sir.

Q. When it turned in the curve, the front end where you were came into the curve, and that cut you entirely from the engineer?

A. Yes, sir.

Q. And cut him off from your light and signal?

A. Yes, sir.

Q. You couldn't have put your lantern out then and given a signal to the engineer?

A. No.

Q. And he couldn't have leaned out of his engine and seen your signal on that car you were on after you turned the curve?

A. No.

Q. After you turned the curve, what was the first thing that attracted your attention by making you think something was wrong?

A. I was looking for Mr. Carter, and when we got around the curve a little further I saw the train I was on and the car he was on were not coupled.

Q. You saw it was not coupled?

A. Yes, sir.

Q. How wide was the couple then?

A. Looked about three car lengths.

Q. Did you see his light then?

A. I didn't notice his light.

[fol. 53] Q. But you knew that was supposed to be his car?

A. I saw him on it.

Q. What is that?

A. I saw him on it.

Q. You saw him on it. What did you do at that time?

A. I jumped off the car and ran back to the main line.

Q. I will ask you, Mr. Morrison, if in ordinary railroad practice in getting off of a car, running at that rate of speed, you climb down by the side by the handle—steps.

A. Well, that's according to how rushed——

Q. I am not asking you about any emergency, but ordinarily you climb down, don't you?

A. Yes, sir.

Q. How far were you above the ground at that time?

A. I haven't any idea.

Q. About how far?

A. Ten or twelve feet; ten.

Q. How did you get down?

A. Jumped.

Q. Jumped all the way?

A. Yes, sir.

Q. With your light in your hand?

A. Yes, sir.

Q. And the train moving?

A. Yes, sir.

Q. And on your feet when you got down?

A. I got down on my hands. Wouldn't say that.

Q. What did you do then?

A. Went back to the main line.
Q. Was this off to the right?
A. Well, it was off to the west.
Q. Off to the northwest?
A. Yes, sir.
[fol. 54] Q. You ran back there to where you could get in position where you could see from there and send your signal?
A. Yes.
Q. When you got over there, what signal did you give?
A. I washed him out.
Q. What do you mean?
A. Emergency.
Q. Emergency stop?
A. Yes, sir.
Q. That signal railroad men call a washout signal?
A. Yes, sir.
Q. That means stop and stop right now?
A. Yes.
Q. What happened—do you know what rate of speed the train was running at that time?
A. Best of my judgment, when I got off the train it was running around five or six miles an hour.
Q. Five or six miles an hour?
A. Yes.
Q. How was the grade? Was the train going downgrade or level or upgrade?
A. Downgrade.
Q. Pretty steep grade?
A. Pretty good grade. I don't know what percentage.
Q. Was this car that was loose there, this L. & N. car, was it coasting down that grade?
A. I could not say whether it was rolling or whether it had stopped. I didn't take time to stop, but it had been going downgrade, that loose far.
Q. It had been going downgrade?
A. Yes, sir.
Q. When you gave this washout signal did you get any response from the engineer?
A. Yes. He stopped.
[fol. 55] Q. Could you tell how far he ran after you gave the washout signal?
A. It might have gone 40 or 50 or 60 feet.

Q. 40 or 50 or 60 feet. Sixty feet would be about a car length and a half, would it not?

A. Yes, sir.

Q. Could you tell whether or not the emergency was applied? Could you hear the emergency airbrake applied before this stop?

A. I didn't hear them.

Q. If the emergency air brakes had been applied, you could have heard the noise, hiss of the air, couldn't you?

A. Well, ordinarily there is a pretty good noise round that line over there.

Q. And you could hear the emergency on the airbrake?

A. I could not tell.

Q. If anyone ever put the emergency on, you don't know it?

A. I didn't hear it.

Q. Did you hear this car then when it struck the L. & N. number whatever-it-was,—you heard it strike?

A. Yes, sir.

Q. And then what did you do?

A. Well, I was waving the man down.

Q. You were still waving him down?

A. Oh, he stopped when I waved him down the first time. I guess he saw it.

Q. You don't know whether he saw your signal or not. Your washout signal, was that what stopped him?

A. Yes, I guess it was.

Q. That was your judgment, but he couldn't see any signal until you jumped off the train, and ran out there and gave the washout signal?

A. No, sir.

Q. As a matter of fact, in that running didn't you have to cross the main line?

[fol. 56] A. Had to go across the main line around some cars.

Q. You did have to go across the main line around some cars?

A. Yes, sir.

Q. You gave the washout signal just as soon as you got where the engineer could see the signal?

A. Yes.

Q. How far did you travel from the time you jumped until you got to the point where the engineer could see your signal?

A. I guess about two or two and a half car lengths.
Q. That would be about eighty——
A. Eighty or ninety feet.
Q. After the train stopped, did you go down there?
A. Yes, sir.
Q. Where was Carter when you got there?
A. On the ground.
Q. Where was he with reference to the L. & N. car?
A. He was standing by it.
Q. Standing on the ground?
A. Yes.
Q. Did he complain of suffering pain at that time?
A. I asked him if he was hurt, and he told me his leg was hurt, and he didn't know how bad it was hurt.
Q. He didn't know how bad it was hurt?
A. Yes.
Q. Did he say he was suffering any pain?

Mr. Lee: We object to leading.
The Court: Tell what he did say.

Q. What did he say at that time?
A. He said—I asked him if he was hurt. He says "Back of my leg is skinned. I don't know how bad I am hurt." [fol. 57] I then asked him would he want to go down in the woodyard, or go in the shack?
Q. Wanted to go back in the shack?
A. Asked him if he wanted to go.
Q. Do you know whether he went back in the shack or not?
A. Well, he went on in the yard.
Q. When did he come back later, or do you know?
A. Come back where?
Q. Did he go back in the shack, or to the first aid place?
A. First aid place, and I walked on home.
Q. Did you make any examination of the load on this car, or the condition of the car, when you got there?
A. No, sir.
Q. Now, Mr. Morrison, as an old railroad man I will ask you to state whether or not if this L. & N. No. — what is that number?

Mr. Jackson: 20042.

Q. (Resuming.) . . . 20042 had been standing there, was parked there the first time, at the point where the coupling was attempted, if the brakes had been on that car,

and this train and engine had come down under a slow signal, and had hit that L. & N. car, if the L. & N. car brakes had been on with this air, and the brakes had been properly functioning, how far would it have shoved, if shoved at all?

A. I think just take up the slack between the cars.

Q. Would not have moved?

A. No.

Q. If the brakes were off, and it had gotten the bumping it did get, then it would have rolled free?

A. Yes, sir.

[fol. 58] Q. And it did do that, and went on ahead, and you saw it?

A. Yes, sir.

Q. I will ask you to state if this automatic brake had been in good working order when they attempted this shoving the first time, would it shove——

Mr. Lee: You said "automatic brake." You mean "Automatic coupler."

Mr. Pettus: I mean automatic brake. If it had been in working and in good working order.

A. (None.)

Q. Did you see Mr. Carter after that?

A. After what?

Q. After that night? Did you see him later?

A. Not for a few days.

Q. Some few days after that?

A. Yes, sir.

Q. When you saw him again, did he complain of pain?

A. He said his back was hurt.

Q. He said his back was hurt?

A. That's what he told me.

Mr. Pettus: You can take him.

Cross-examination.

By Mr. Lee:

Q. When you-all first picked that 20042 did the automatic brake work then?

A. Yes, sir.

[fol. 59] Q. Set it on the main line?

A. Yes, sir.

Q. Who was the man that set it on the main line?

A. Carter.

Q. Carter was the man who set it on the main line, and you said the brake was supposed to be set?

A. Yes, sir.

Q. Who was the man on the main line?

A. Carter.

Q. Carter was in charge, and didn't set the brake?

Mr. Pettus: We object.

Q. Did any other carman on that main line have anything to do with L. & N. 20042?

A. No, sir.

Mr. Pettus: When it was set out there?

Witness: None but Carter.

Q. You say when the train went in the storage flat, you picked up a box car and eight flats, the box car was next to the engine?

A. Yes, sir.

Q. Picked up eight flats, backing up there on the main line?

A. Yes, sir.

Q. Your position on that crew was what you call footboard man? Is that right?

A. That's right.

Q. Was a part of your duties, in and about these switching operations, the protection of those crossings that you were crossing during that period of time?

[fol. 60] A. Yes.

Q. That was part of your duties.

A. Yes, sir.

Q. Then, as I understand your evidence, you backed out onto the main line from the inside storage track, pulling the box car and the eight flats, the train moving further back down in the direction of where L. & N. No. 20042 was?

A. That's right.

Q. Who gave the signal to do that?

A. After I threw the switch, I give the signal.

Q. You threw the switch, gave the signal ahead, and you proceeded to protect the Pledgers crossing?

A. That's right.

Q. After you signaled to go ahead, I believe you said Mr. Carter—when you went back to the main line, Mr.

Carter got across on this main line where L. & N. No. 20042 was, didn't he?

A. Yes, sir.

Q. And he was down——

Mr. Pettus: When you were back down here around the crossing?

Witness: That's right.

Q. After you threw the switch and signaled ahead up here, did Mr. Carter give any signal before that coupling was attempted?

A. Before my attention was attracted to this car coming, he gave a slow ahead signal.

Q. Before your attention was attracted to the car coming, he gave a slow ahead signal?

A. Yes, sir.

[fol. 61] Q. That's Carter?

A. Yes, sir.

Q. To Engineer Grant?

A. Yes, sir.

Q. What did that mean?

A. That means slow along and fixing to make a coupling.

Q. Slow along and fixing to make a coupling. You say prior to that time the L. & N. 20042 had coupled?

A. Yes, sir.

Q. How many couplings had been made on L. & N. 20042 before that particular coupling was attempted?

A. We picked it up in the shipyard in Panama City, and we had picked up some more cars going over to Springfield.

Q. Any coupling to it?

A. I don't remember whether we had it on the jack to come out, or whether there was a car on that jack, but to the best of my knowledge we didn't have any trouble with this couple when we first got it.

Q. It was equipped with automatic coupling and it worked during those operations before you came down?

A. Sure.

Q. Now, you say when you saw Mr. Carter give the slow ahead signal, your attention was attracted to a car up there on that crossing?

A. That's right.

Q. Did you turn and watch that car?

A. Yes, sir

Q. All right. Now, at that time, Mr. Morrison, in your judgment or opinion how fast was that train traveling, that is, when you waved him ahead and before Mr. Carter slowed him down?

A. Oh, when he was slowed along there I don't imagine he was traveling over two miles an hour.

[fol. 62] Q. Over two miles an hour. That is immediately preceding the time you heard the noise when that coupling was attempted?

A. That's right.

Q. You didn't see the coupling when it was attempted there, did you?

A. No.

Q. After the coupling was attempted you say there was a momentary pause in the movement of the train?

A. Yes, sir.

Q. The train moved ahead then?

A. Yes, sir.

Q. Did you hear Engineer Grant acknowledge any signal at that time?

A. No, sir.

Q. You didn't hear any acknowledgment of his?

A. No.

Q. But you do know the train moved ahead?

A. Yes, sir.

Q. At that point, just immediately prior to the time that coupling was attempted, where was Mr. Carter?

A. He was standing alongside the L. & N. when they come together.

Q. Where they come together?

A. I judge that.

Q. That on the side, where the coupling was attempted?

A. Yes, sir.

Q. At that time was Carter in clear view of J. L. Grant, the engineer of that train?

A. Yes, sir.

A. He was?

A. Yes.

Q. Where Mr. Grant could see him?

A. Yes.

[fol. 63] Q. Do you know whether or not at that point, after that coupling had been attempted,—whether or not Mr. Carter gave Mr. Grant any further signal?

A. I don't know.

Q. The train moved forward. Did you know the coupling had been missed?

A. No.

Q. As the train moved forward, you got on the fourth flat?

A. Yes, sir.

Q. From that point on down did Mr. Carter give any signal?

A. If he did, I didn't see him.

Q. He had a lantern there. Were you in view of Grant?

A. Not after I went around the curve.

Q. I am talking about before you went around the curve?

A. What about that?

Q. You were in view of Mr. Grant?

A. Yes, sir.

Q. Before you went around the curve, did he at any time give to Mr. Grant any signal?

A. I did not see him give any.

Q. You were in view of him? You could have seen him?

A. Yes.

Q. Then the car proceeded around the curve?

A. Yes.

Q. It was at that point, after you proceeded around there, you discovered the coupling had not been made?

A. That's right.

Q. At that point you say you jumped down immediately and washed out Engineer Grant?

A. Yes, sir.

[fol. 64] Q. That's correct. When you discovered that coupling had not been made, how fast, in your judgment, was that train going, in your opinion?

A. I judge five to six miles.

Q. Five to six miles an hour, and you ran out and gave that washout signal?

A. Yes.

Q. Did that train immediately stop?

A. Stopped pretty quickly.

Q. That's what I say. It did stop, you testified, within forty or fifty feet?

A. Yes.

Q. I believe you testified?

A. Yes, sir.

Q. At the time you gave the washout signal, how far was that end of the train, the woodrack on which he was? Can

you give any idea of that?

A. I could not. At the time I couldn't see through that.

Q. You could not see from where you were?

A. I could not see from where I was.

Q. But you said the train immediately started diminishing its seed, and at the same time you heard the noise, pretty close together?

A. Yes, sir.

Q. The noise you heard when coupling?

A. Yes, sir.

Q. And the stopping of the train was almost concurrent, wasn't it?

A. Stopped very quickly.

Q. When they went to couple at that time, did the couple work?

A. Yes, sir.

Q. You went down and saw Carter?

A. Yes, sir.

[fol. 65] Q. I believe he said he would go on down in the woodyard where you were going to stop this car, place this car?

A. Yes, sir.

Q. He went on to the woodyard on this train and cut this car off on the crane track, didn't he, Carter himself?

A. Yes, sir. He left it there.

Q. Carter still rode the lead car, as swing boardman —swingman?

A. Yes, sir.

Q. And Carter cut the car off down on the lead track?

A. Yes, sir.

Q. That's the time when Mr. Whitten came up?

A. Mr. Whitten went in on the engine.

Q. I mean, when he came up where Carter was, when he first saw Mr. Carter? Is that right?

A. I don't remember whether he had completed the spotting of this woodyard and come back or not.

Q. What I mean, Mr. Morrison, is that Carter went on down and completed the spotting of that car before he ever went to the first aid station?

A. Yes.

Q. That's right?

A. Yes, sir.

Q. When he left from there was he walking under his own power?

A. Yes, sir.
Q. And who left there with him?
A. Mr. Whitten.
Q. Mr. Whitten?
A. Yes, sir.
Q. Now, Mr. Morrison, you are familiar with automatic couplings that this car was equipped with?
A. Yes, sir.
[fol. 66] Q. I'll ask you if it is an unusual procedure or an unusual thing for a car not to couple, even though the automatic coupling is in good working order?
A. No.

Mr. Pettus: We object to that.
Mr. Lee: That is thoroughly competent, if the Court please. He alleges a defect in here.
The Court: I have to overrule the objection. He has already answered it in the negative.
Mr. Pettus: Allege a violation of the Safety Appliance Act, and negligence vel non won't cut any ice. If there was a violation of the Safety Appliance Act they are liable, regardless.
Mr. Lee: The law is very clear on this point, your Honor——
The Court: They would not be liable if the coupler just didn't hurt one man.
Mr. Pettus: We except to your Honor's ruling.

Q. You say it is not an unusual thing to happen?
A. No.

[fol. 67] Mr. Pettus: We object your Honor.
The Court: Yes.
Mr. Pettus: Repetition.

Q. And it was effective on that end of the operation from that period of time on down to that point? Every coupling which was attempted, with the exception of that one, with this L. & N. car 20042, worked every time, didn't it?
A. Yes.

The Court: Did you answer the question?
Witness: Yes, sir.

Redirect examination.

By Mr. Pettus:

Q. As a matter of fact, Mr. Morrison, didn't the automatic coupling on that same car on the other end fail three times in the wood *w*ard the same trip?

A. I couldn't say that. I was ten car lengths from it then.

Q. But one coupling did?

A. Yes, sir.

Q. And that car was down in there?

A. Yes, sir.

Q. Wasn't this car a bad order car?

A. If it was, I didn't see it.

[fol. 68] Q. You didn't see any bad order marking on it?

A. No.

Q. When the car was first—attempted coupling was made, you said a momentary pause was made, was that long enough to couple up the air?

A. No.

Q. Didn't stop long enough to couple up the air?

A. No.

Q. Wasn't that an indication there was something wrong?

Mr. Lee: We object to that. Purely speculative, an indication of something wrong.

Q. The air must be coupled up? That's a railroad practice, is it not, that the air must be coupled up?

A. We do it, yes, sir.

Q. And this momentary pause didn't give a length enough of time to make the air coupling with that car, did it, on that occasion?

A. I don't think so.

Q. And the fact that it didn't stop long enough to connect up the air and couple there was an indication something was wrong?

Mr. Lee: We object to that. Purely speculation.

The Court: I believe I will overrule it.

Mr. Lee: Save the exception.

[fol. 69] A. Well, not always. Once in a while you lose a car on it. It is not a rule, but one in a while we do.

Q. It is a safe and it is a good practice to do it, is it not?

The Court: You are inclined to argue too much with the witness. Let's get along.

Mr. Pettus: I want to ask him whether or not it was a good practice, your Honor.

Q. Now, Mr. Lee asked you about how quick the car stopped—after you gave the washout signal, how quick the train stopped. From the time you jumped off, how long was it before it stopped? How long did it take you to jump off and run this ninety to a hundred feet before you could give the signal?

A. It was a matter of seconds. I couldn't say exactly how many.

Q. You had to make a good many steps to cover that ninety or hundred feet?

The Court: That would be a matter of common knowledge for the jury.

Q. Were you running any faster than the train was traveling?

A. I was going in the opposite direction. I don't know, sir.

Mr. Pettus: That's all.

[fol. 70] The Court: We have got to get along.

Mr. Lee: Just one question, Judge.

Recross-examination.

By Mr. Lee:

Q. At any time during that switching operation did that car or train exceed the speed of five to six miles an hour? At any time during that switching operation that is involved in this matter?

A. I couldn't say definitely.

Q. I mean, in your judgment and opinion?

Mr. Pettus: We object, if the Court please. He said he couldn't say.

Witness excused.

Mr. Jackson: Will your Honor state to the jury, or permit me to state to the jury, what depositions are?

The Court: Well, it's simple. Questions propounded to the witnesses that are not here, and answered in writing, and read in your presence, and the same as if the witness were here.

Mr. Pettus: And as to the interrogatories, the defendant will ask your Honor to state we are not bound by them, we can controvert them. We are not bound by all of them.

[fol. 71] Mr. Lee: He's changing a little rule of law if he offers them as evidence in behalf of the plaintiff in this case.

The Court: If you don't expect to be bound by them, I don't see the use of offering them.

Mr. Pettus: As a general rule it is for the plaintiff to offer it, but in the State and Federal Courts they are not bound by them.

Mr. Jackson: We want to offer only the interrogatory consisting of Exhibit A, which shows the earnings of Mr. Carter for the twelve months immediately preceding the injury.

The Court: All right. Read it to the jury.

Mr. Lee: You can state that as a matter——

Mr. Pettus: Just read it off. Read it in the record.

Mr. Lee: We will agree to that exhibit to be in.

Mr. Jackson: All r-ght. This is Exhibit A, showing Mr. Carter's earnings for the 12 months preceding the injury.

Mr. Lee: Just go ahead and read it.

[fol. 72] Mr. Jackson (Reading Exhibit A attached to the answers of defendant to interrogatories propounded by plaintiff):

His earnings for February, 1945, were $187.62; March, $299.62; April, $287.62; May, $281.00; June, $250.76; July, $318.78; August, $307.84; September, $315.44; October, $214.75; November, $228.73; December, $292.02; and January of 1946, $144.57, a total of $3128.57 for the twelve months.

Mr. Pettus: We are not offering more, but we do desire to preserve the question, exception to your Honor's ruling that if we offer the entire interrogatories that we would be bound by them, simply what they are as an interrogatory. Your Honor has already ruled on it. I don't know whether I got that exception or not.

The Court: I don't know whether I understand your objection. I am ruling you can offer any part of the inter-

rogatory you want. If you don't want to, you can leave it out.

Mr. Pettus: Yes, sir.

The Court: I don't understand how a Court can admit evidence, and then the person that offered it not be bound by it.

Mr. Jackson: This is the examination of witnesses beginning on the 26th day of November, 1947, on behalf of the plaintiff, before me, Dalton Swann, Offical Court Reporter in and for the Tenth Judicial Circuit of Alabama; the deposition of the said Dr. William G. Thuss being taken [fol. 73] at his office in the City of Birmingham, Alabama; and the deposition of the said James L. Kirkpatrick, being taken at his office in the City of Brimingham, Alabama, the plaintiff being represented by counsel in the person of J. K. Jackson, of Birmingham, Alabama, and the defendant being represented by counsel in the person of Alto V. Lee, III, of Dothan, Alabama.

Reporter's note: The depositions are marked Plaintiff's Exhibit No. 2, together with exhibits attached thereto. There are noted in this transcript the page numbers of the depositions where objection was made to a question, the quotation of the question objected to, the grounds assigned on this trial, rulings of the Court, and exceptions taken herein.

EXERPTS FROM DEPOSITION OF DR. WILLIAM G. THUSS

On direct examination of Dr. William G. Thuss, Mr. Pettus read the questions and Mr. Jackson the answers.

Page 9 of the deposition: "Q. With the series of symptoms that the man has? All right. Now, assuming, Doctor that this man was involved in a railroad accident, in February, 1946, where he had a very serious blow to his body in that region of which he made complaint, could this condition that you have described, could that be ascribable to that kind of accident?"

Mr. Jackson: You objected to that, Alto.

Mr. Lee: In taking this testimony Mr. Jackson and I had an agreement that he would note objections at the point appearing in the testimony, and on the trial of the case we would assign our grounds; and to that point we would assign the ground that it is incompetent, irrelevant and

[fol. 74] immaterial and based upon a hypothesis which is not founded upon the evidence in this case.

The Court: Overrule the objection.

Mr. Lee: Except.

The Court: Mr. Pettus, is there considerable more of this same deposition?

Mr. Pettus: What's that, your Honor?

Mr. Jackson: Your Honor, we are now on page 10 and the deposition runs through 25.

The Court: Gentlemen, I think that deposition is out of all length. You ask him what it is, and ask him what he means by that.

Mr. Pettus: When he speaks about a spondylolisthesis we have got to find out what he means.

The Court: Yes, but he answers and then you again ask him what it means.

Page 10 of the deposition: "Q. I will ask you to state whether or not, in your professional opinion, Mr. Carter, the man that you examined and about whom you are testi- [fol. 75] fying, is physically able to carry on the vocation of a railroad brakeman?"

Mr. Jackson: Alto, you object to that.

Mr. Lee: That objection is noted on the grounds that it is incompetent, irrelevant and immaterial, based on a hypothesis not founded on the evidence in this case, and the witness is not properly qualified to give such an answer.

The Court: Overruled.

Mr. Lee: Exception.

Mr. Jackson: Now, the cross-examination. You want to read?

Mr. Lee: Yes.

On cross-examination of the witness Dr. Thuss, Mr. Lee read the questions and Mr. Jackson the answers.

Page 21 of the depositions: "Q. Are operations for these conditions successful, Dr. Thuss? A. I recently saw a survey of the results of a survey over a six-year period on approximately two hundred highly selected cases that were reviewed by one insurance company. I say selected, because, obviously, they had had thousands of back cases, but these cases were operated on by competent men over the country. They classified their results, and these figures are approximate but fairly close: Of these two hundred

[fol. 76] highly selected cases by this one particular company, over a six-year period—now, these cases were not reviewed to see whether these patients should or should not have been operated or whether they were well operated or not well operated; all they said, here are two hundred cases that were paid on. The men were disabled so long, and the cost to us so much; there was no question as to whether the operation was necessary or not necessary.

Q. "But they were all operated on?"

The Court: A good deal of this is not response to the questions asked, and a great, long dissertation by the doctor to show how learned he is.

Mr. Pettus: Will your Honor permit us to read that?

The Court: How is that?

Mr. Pettus: Will your Honor permit us to read that?

The Court: I reckon there is no other way. I don't know of any other. If I had that doctor here and being examined before me.

Mr. Pettus: Your Honor, it is material for this reason.

The Court: I know some of it is material.

[fol. 77] Mr. Pettus: If the condition be curable by operation, of course, it would be vital; but this shows the operation is highly speculative and unsatisfactory in results.

Mr. Lee: We object.

The Court: Well, some of it is highly speculative and don't know whether they would or not. Go ahead.

"A. They were operated on by very competent men throughout the country. Of these two hundred——

The Court: He could have answered that question in four words; then he goes on making a great, long speech.

"A. (Continuing): . . . Of these two hundred cases they classified them as to good results and poor results. The good results were cases that got well in approximately a year. The poor results were cases that didn't get well in a year, or some of them apparently never did get well. The sum total was that approximately from sixty to sixty-six per cent were classified as good. The other forty per cent were classified as poor results."

Mr. Pettus: Re-direct examination: "Just one more question."

Mr. Pettus read the questions and Mr. Jackson the answers.

Page 23 of the deposition: "Q. Highly screened cases? You mean by that, they were cases which the Doctors who were making the examinations and doing the cutting, they [fol. 78] thought that they had the best chance of successful outcomes of the operations in those two hundred cases? Is that right?"

Mr. Jackson: Alto, you object to that.

Mr. Lee: The objection is noted on the grounds of incompetency, irrelevant, illegal and immaterial, and not germane to anything in this cause.

The Court: Overruled.

Mr. Lee: Exception.

"Q. Well, just state what you mean by that. A. Well, I think they were highly selected cases. I think they were cases where they have been thoroughly studied. I think they were cases where the doctors had gone over them carefully and undoubtedly were cases that the insurance companies had been consulted and their approval as to the operative procedure had been carried out. By 'screened' they were selected and worked up; some of them had been discarded as being inoperative; some of them had refused the operation, and some of them had drifted elsewhere, but they were selected cases out of a large group."

The Court: I think the answer to that is probably objectionable, because he doesn't undertake to say that he has knowledge about that; only what he thinks about it.

[fol. 79] Mr. Lee: Objection was noted to the question on that basis.

Mr. Jackson: There was no objection to the question just answered.

Mr. Lee: Well, objection to the previous question, "state what you mean about that".

Mr. Pettus.

Re-cross by Mr. Lee:

Mr. Lee read the questions and Mr. Jackson the answers.

Mr. Jackson: That's all of the examination for the doctor, Judge. Next man is named Kirkpatrick.

EXCERPTS FROM DEPOSITION OF MR. KIRKPATRICK

Mr. Pettus read the questions and Mr. Jackson the answers on direct examination.

Page 26 of the deposition: "Could you just briefly state for the record what purpose the mortality tables serve in your business?"

Mr. Lee: We object to that as incompetent, irrelevant, illegal and immaterial, and not germane to the issues in this case.

The Court: Read the record.

Mr. Pettus: "Could you just briefly state for the record what purpose the mortality tables serve in your business?"

[fol. 80] Mr. Lee: That was for the purpose of life insurance business.

The Court: Overrule.

Mr. Lee: Save the exception.

Page 27 of the deposition: "Q. On the basis of these tables you can tell what a man's life expectancy is, assuming he is in good health, can't you?"

Mr. Lee: We note an objection on the same grounds: incompetent, irrelevant, illegal and immaterial, and not germane.

The Court: Overrule.

Mr. Lee: Save the exception.

Page 28 of the deposition: "What would be his expectancy, Doctor, based on these tables that we were just talking about?"

Mr. Lee: We object. Incompetent, irrelevant and immaterial, not germane to the issue.

The Court: To be competent it would have to be shown he was in normal health.

[fol 81] Mr. Jackson: No, sir. They have stated these tables are applicable to anybody.

Mr. Lee: As long as they were in good health.

Mr. Jackson: No. He rejects that in his answer.

The Court: Well, overrule.

Mr. Lee: Save the exception.

Page 28 of the interrogatories: "Q. Well, on the basis of the table commonly used by insurance companies, what would be his expectancy?"

Mr. Jackson: You object.

Mr. Lee: It is incompetent, irrelevant and immaterial, and not germane to the issue.

The Court: Overrule.

Mr. Lee: Except.

"Q. On the basis of the table which you would use here in the performance of your duties?"

[fol. 82] Mr. Lee: Same object; same grounds.

The Court: Overrule.

Mr. Lee: Except.

Page 29 of deposition: "Q. On the basis of those tables, what would be the expectancy of a man thirty-five years, seven months and fifteen days——

Mr. Lee: We object. Incompetent, irrelevant, immaterial, and not germane to the issues of this case, and not predicated on the man being in good health at the time that was made.

The Court: Overrule.

Mr. Lee: Except.

Page 29 of deposition: "Q. Now, Mr. Kirkpatrick, at the interest rate of 5%, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy of a man 42.91 years?"

Mr. Lee: We object as incompetent, irrelevant, illegal and immaterial, and not germane to the issue in this case.

The Court: Sustain the objection on that.

[fol. 83] Mr. Jackson: Could you hear us, your Honor, on the law on that?

The Court: Well, after we get through I will hear you on that.

Mr. Lee: Of course, he went ahead and had sustained the objection on that question. That would eliminate that second one.

Mr. Jackson: Was the objection first by your Honor sustained, and his request to restate the question?

The Court: Yes.

Mr. Lee: That would be the same question, and the same ruling required there.

Mr. Pettus: We except.

Page 30 of deposition: "Q. Now, Mr. Kirkpatrick, I will ask you the same question at the interest rate of five and one-half per cent?"

Mr. Lee: We object to that; incompetent, irrelevant, illegal, and not material to the issue in this case.

The Court: Sustained.

[fol. 84] Mr. Pettus: We except.

Page 30 of deposition: "Q. Mr. Kirkpatrick, at the interest rate of six per cent, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy, the life expectancy of 32.91 years?"

Mr. Lee: We object. Incompetent, irrelevant and immaterial; not germane to the issues in this case.

The Court: Sustain.

Mr. Pettus: We except.

"Q. Mr. Kirkpatrick, in your capacity here as Chief Actuary of the Protective Life Insurance Company, are you familiar with the income earned on money prudentially invested by your company"?

Mr. Lee: We object. Incompetent, irrelevant and immaterial, and not germane to the——

Mr. Jackson: The question is struck out, anyway.

Mr. Lee: Yes. You withdrew the question.

Q. Are you familiar with the income earned by the money of this company now out on investment?"

[fol. 85] Mr. Lee: We object. Incompetent, irrelevant, immaterial.

The Court: Sustain the objection.

Mr. Pettus: We except.

Page 31 of deposition: "Q. What is the rate of interest that you are now earning on money of that sort, what do you average?"

Mr. Lee: We object. Incompetent, irrelevant and immaterial.

The Court: Sustain the objection.

Mr. Jackson: We except to that. Then by the witness: "Q. May I ask a question?" By Mr. Lee: "That is all right." Then he gives the answer.

Mr. Lee: Well, it has reference to the question to which the original objection was noted. Any answer to that would

be included. We object. Incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Pettus: We except.

[fol. 86] Mr. Lee: If the Court please, that is a continuation of the same question on the same line to which that objection was noted.

Mr. Jackson: Mr. Lee and I specifically agreed he would reserve an objection to each question.

Mr. Lee: That's right.

Mr. Jackson: And no such reservation to this question——

Mr. Lee: I know, Kirk; but the same line.

The Court: I will let that stand, in the light of the ruling already made.

Mr. Pettus: We except.

"Q. Now, can you tell us what Government securities will pay, what percentage an investment in Government securities will be if the investment were made as of approximately now, what can you get on Government issue. ——"

Mr. Lee: We noted an objection to that. It is incompetent, irrelevant and immaterial.

[fol. 87] The Court: Objection sustained.

Mr. Pettus: We except.

Page 32 of deposition: "Q. Now, what rate of return could be safely obtained on first-class listed securities other than Government issues, in your judgment, now, Mr. Kirkpatrick?"

Mr. Lee: We object: Incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Pettus: We except.

Mr. Jackson: We offer the depositions in evidence.

Mr. Lee: With the offer of them, we renew the same objections as are noted in the course of the reading, the reading of the question and answers. I mean, as a matter of record.

Mr. Jackson: I am not trying to get the testimony in evidence that your Honor ruled out. Just merely want to go through the offering of the depositions, in the routine manner.

Mr. Lee: Oh, no.

The depositions are marked Plaintiff's Exhibit 2.

[fol. 88] Mr. Pettus: By that statement we don't waive our exception as to your Honor's ruling as to your view.

The Court: No.

Mrs. Neroy Carter, a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pettus:

Q. Mrs. Carter, are you the wife of Mr. Neroy Carter?

A. Yes, sir.

Q. About how long have you been married?

The Court: Speak loud.

Q. Talk out loud.

The Court: The jury has got to hear you.

A. Sixteen years.

Q. Do you remember the occasion in February, 1946, when he got hurt?

A. Yes, sir.

Q. Prior to that time, I will ask you to state whether he had been in good health?

A. Yes, sir.

Q. Had he ever complained of any trouble or pain in his back before that time?

[fol. 89] Mr. Lee: We object to any matter that is in the nature of a self-serving declaration.

The Court: Overruled.

Mr. Lee: Save the exception.

Q. Had he been hurt before that time?

A. No, sir.

Q. Did he appear to be in good health?

A. Yes, sir.

Q. Did he work regularly?

A. Yes.

Q. Could you say whether or not he slept at night, before he got hurt?

A. He did.

Q. After he got hurt in the accident, did he complain of suffering pains?

Mr. Lee: We object.

The Court: Overrule.

Mr. Lee: The grounds are it is purely self-serving and incompetent, irrelevant and immaterial. Save the exception.

A. Yes, sir.

Q. Did he complain of pain in his back?

[fol. 90] Mr. Lee: We object. Same grounds.

The Court: Overrule.

Mr. Lee: Save the exception.

A. Yes, sir.

Q. I will ask you to state whether or not from the time he was hurt up to the present time he has continued to complain of pain?

Mr. Lee: We object.

The Court: Overrule.

Mr. Lee: Self-serving nature, incompetent, irrelevant and immaterial, and not germane to the issues in this case.

A. Yes, sir.

Q. Has he appeared to be in pain since that time?

Mr. Lee: We object to whether he appeared to be in pain.

The Court: I will give you an exception to all of this.

A. Yes, sir.

Q. How has he been about his sleeping at night since he got hurt?

A. He doesn't sleep well at all.

[fol. 91] Q. And does he appear to suffer from nervousness and inability to sleep?

A. Yes. Very much so.

Q. I'll ask you to say whether or not the doctors have given him sedatives or something to make him sleep or ease his pain?

Mr. Lee: We object to that, unless she knows.

The Court: Seems to me like the doctors would be the proper ones to state that. She might not know what the different drugs were or not. Sustain the objection.

Mr. Pettus: We except.

Q. Has he been able to work or appeared to be able to work since he got hurt?

A. No.

Mr. Pettus: All right. You may take her.

The Court: Any cross-examination?

Cross-examination.

By Mr. Lee:

Q. Mrs. Carter, your husband has gained considerable weight since this accident, has he not?

A. Well, some.

Q. Approximately forty pounds, hasn't he?

A. Well, I don't think that much.

[fol. 92] Q. But he has gained weight over that period of time since this accident?

A. Some.

Mr. Lee: Some. That's all.

Mr. Pettus: That's all, Mrs. Carter.

Witness excused.

Mr. Neroy Carter, the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pettus:

Q. Mr. Carter, how old are you?

A. Thirty-five.

Q. When were you born? Do you remember the day?

A. April 12th. April 17th, 1912.

Q. How long had you been working as a railroad man when you got hurt?

A. Well, I started to working with them, if I don't make any mistake, the 28th day of August, 1943.

Q. What other work had you done before you went into railroad work?

A. You mean——

Q. All along. What was the first work you did?

A. Well, I have pulp wood; I have drove dump trucks.

Q. Have driven what?

A. Dump trucks, State Road Department. I have worked for the police department, a policeman, and I have—until I started to work for the Bayline.

[fol. 93] Q. Now, have you ever done any farm work?

A. Yes, I did. I had farming practically the biggest part of——

Q. (Interposing:) Have you ever done any work except work that required physical labor and exertion?

A. No, never have.

Q. You said something about pulp. How high did you go in school?

A. Well, it was partly through the 9th grade.

Q. Partly through the 9th grade. Never got any other schooling?

A. No, sir.

Q. No college course or anything like that?

A. No, sir.

Q. You speak of hauling. You hauled this pulp and drove dump trucks?

A. Yes, sir.

Q. That heavy work?

A. Yes, sir.

Q. Kind of tough, heavy and tiring work?

Mr. Lee: We object to continual leading.

The Court: Yes. You have shown he has never done anything only on physical labor.

Mr. Pettus: Yes. Wanted to show he had done kind of hard work.

Q. Since you were hurt, were you able to do any work?

A. No, sir.

Q. Were you in good health at that time?

A. Yes, sir.

[fol. 94] Q. Did you suffer with your back?

A. No, sir.

Q. Did you ever know you had any back?

A. Didn't know I had any back.

Q. Were you able to do a good day's hard work?

A. Put in an honest day's work.

Q. And since that time you say you haven't been able to do physical work?

A. No, I haven't.

Q. Is there any sort of work you know how to do and can do in your present condition?

A. No, I am not. I am not a skilled laborer.

Q. Since you have got hurt have you gained anything in weight?

A. I imagine around from five to eight pounds.

Q. How much?

A. From five to eight pounds; I imagine something like that.

Q. I will ask you to state whether or not you suffered from pain from the time you were hurt up until now?

A. Yes, I have.

Q. I will ask you to state whether or not it affects your sleep and your rest?

A. It does. Very much so.

Q. I will ask you to tell the jury whether you suffer from this rigidity of your back?

A. Yes, I do.

Q. Are you able to bend and lift and use your back?

A. No, I can't bend.

Q. Are you able to stand or walk long periods of time?

A. No, sir I can't walk more than about two blocks before I have to rest.

Q. When you sit down and try to sit still any length of time, are you able to continue in that condition?

A. No, sir, I can't.

[fol. 95] Q. You have to stretch out your backbone?

A. Yes, sir.

Q. Have to get up to relieve your back?

A. Yes, sir.

Q. And about the medicine. Have to take medicine?

A. Biggest part of the time I take something to ease me to annul the pain enough to go to sleep. I probably sleep to midnight; sometimes I get up at two or three o'clock.

Q. You take the prescription?

A. Yes, sir.

Q. Something the doctor gave you to ease the pain?

A. Yes, sir.

Q. Did you ever take anything like that?

A. No.

Q. Ever take anything like that before you got hurt, to sleep?

A. No, sir.

Q. Did not. Now, Mr. Carter, you remember the occasion when you got hurt. Were you examined by a doctor after that?

A. Yes, I was.
Q. Who was the first doctor you saw?
A. Dr. Nixon. J. M. Nixon.
Q. Where was that?
A. Panama City Hospital. Panama City, Florida.
Q. Is he the railroad company's doctor?
A. Yes, sir.
Q. Were you sent there?
A. I was carried there by the railroad official.
Q. How many times has Dr. Nixon seen you?
A. How many times has Dr. Nixon seen me?
Q. Yes. How much has he seen you, altogether?
A. Well, I couldn't answer that question.
Q. How often did he see you when you were down there the first occasion you were there?
[fol. 96] A. Well, Dr. Nixon was called to my house. Sent me home on Saturday. He called me up on Sunday morning. I had to go back to his office on Wednesday—I believe it was Wednesday, if I am correct—for him to send me to Dothan.
Q. For him to send you to Dothan?
A. Yes, sir.
Q. Did he send you to Dothan?
A. Yes, sir.
Q. What place did he send you to Dothan?
A. To Ellis Hospital.
Q. Ellis Hospital. Dr. Ellis?
A. Yes, sir.
Q. Were you examined by a doctor?
A. Dr. Lattiway examined me there. At least, took the x-ray.
Q. That the x-ray man?
A. Yes, sir.
Q. Then who examined you?
A. Dr. Ellis.
Q. This same railroad doctor,
A. Yes, sir.
Q. And he is also interested in the railroad company?
A. Yes, sir.
Q. A director?
A. Yes, sir.
Q. Did Dr. Ellis examine you?
A. Yes, sir.
Q. Did he treat you?

A. Yes, sir.
Q. Did he examine the x-ray?
A. I couldn't see.
Q. Were you in the hospital?
A. Yes, sir, I was.
Q. How long were you in the hospital?
A. First time, four days.
[fol. 97] Q. How long?
A. Four days.
Q. How often did Dr. Ellis see you during that time?
A. Approximately every two weeks for a period of time.
Q. When you were at the hospital did he see you every day?
A. I couldn't answer that question.
Q. When you left the hospital, where did you go?
A. Sent me back home.
Q. Who did you come back to see? Dr. Ellis?
A. Yes, sir.
Q. How often did you come back?
A. Around two weeks, I would judge. Sometimes it would be three weeks apart.
Q. How often did you come back, or how long did you keep that up?
A. And kept that up until the second of May, 1946?
Q. What month was this you went there? February 1946?
A. February, 1946.
Q. And kept that up until the second of May, 1946?
A. Yes, sir.
Q. Did you get any better then?
A. No, sir.
Q. Were your pains any better? Were you able to work?
A. Beg pardon?
Q. You could not work or sleep?
A. No.
Q. Didn't get any relief?
A. No.
Q. Went back the second day of May?
A. Yes, sir.
Q. Then what happened?
A. Dr. Ellis put me in a cast.
[fol. 98] Q. Put your back in the cast?
A. Yes, sir.

Q. How high did it come up on you?
A. Came from under my arms to my knees.
Q. Were you in bed at that time?
A. Yes, sir.
Q. With the cast on, you could not get about?
A. Flat on my back.
Q. How long did you continue in that condition?
A. About six weeks.
Q. Six weeks flat on your back, down to your knees, and the cast covered you up?
A. Yes, sir.
Q. That was one of those heavy immobile casts?

Mr. Lee: We object to leading.

Q. All right. I withdraw the question. Tell us what sort of cast was it? I didn't think there would be any dispute about that.

Mr. Lee: We object to counsel saying what he thought.
Mr. Pettus: I will take back what I thought, and quit thinking.
The Court: Tell what kind of cast it was?
Witness: It was a heavy cast. It looked about that thick (indicating).

[fol. 99] Q. He can't write that down.
A. About two inches, I judge.
Q. Did he put anything on it?
A. Something on the order of a broken stick, which kept my leg as far—I don't know how long it stood; but one foot lay on one hospital bed and the other foot up on the other.
Q. Had your legs apart?
A. Yes, sir.

The Court: It was in a cast. Not trying the doctor, whether it was proper treatment or not.
Mr. Pettus: No, sir. Just trying to find out how bad it was.

Q. All right. Then what happened after that? When did he take the cast off?
A. In June.
Q. Then what happened to you?
A. I stayed in the Panama hospital a week.

Q. You went from Dothan then back to the Panama hospital?

A. Yes, sir.

Q. Panama City?

A. Yes, sir.

Q. And stayed there a week?

A. No, just——

Q. (interposing): Was the cast on or off while you were there?

A. Let me correct that. I was confused. He sent me from Dothan to Panama.

Q. Was it in the cast?

A. Put me in the cast in Dothan.

Q. When he took the cast off, were you in the hospital? How long had it been on and where were you?

[fol. 100] A. I was in Panama, I believe.

Q. In Panama City?

A. Yes, sir.

Q. How long were you there?

A. Little over a week.

Q. Were you in bed?

A. Yes, sir.

Q. Then what happened?

A. Dr. Ellis told me I could get up and walk around, and if I make no mistake Dr. Ellis came back down after I had been up and told me — in the hospital another week.

Q. Did he examine you then?

A. He came back that time and sent me home and told me to come to his hospital in four weeks.

Q. During those four weeks, had you gotten cured or still suffering?

A. No, sir, I had not.

Q. Was the pain still evident?

A. Yes, sir.

Q. At the end of the four weeks, did you go back to Dr. Ellis?

A. Yes.

Q. Where?

A. Here in Dothan.

Q. What happened then?

A. Told me to go back home and stay four more weeks and take all the exercise I could, walk all I could.

Q. Did you do that?

A. I did every bit I could.

Q. Did you take exercise?

A. Yes, sir.

Q. I will ask you to state whether or not you found it painful to take exercise?

A. Very painful.

Q. And I will ask you to state whether or not these exercises made it better or made it worse?

[fol. 101] A. I can not state. I could not say about that.

Q. I will ask you if it helped your suffering any?

A. No.

Q. After those exercise periods, state whether or not you were still suffering pain and still suffering disability?

A. Yes, sir.

Q. And still unable to work?

A. Yes, sir.

Q. What happened then?

A. Dr. Ellis, I came back to Dothan when the four weeks was up, and he told me to go back home, and I don't remember—I disremember at the present—no, the last four weeks I was there Dr. Ellis told me he wanted to send me to Atlanta to a doctor which I didn't know anything about. So he told me to go back home and he would let me know, which, I believe, that Mr. Davis was the man that notified me when to go—I won't be positive about that—to Atlanta.

Q. Who is that? Mr. Davis? He is the superintendent, or some high official of the company?

A. Chief Clerk.

Q. He told you to go to Atlanta?

A. He carried me to Atlanta. I guess Dr. Ellis told him.

Q. To whom did he take you in Atlanta?

A. Dr. Fincher.

Q. Did he tell you that was Dr. Fincher's office?

Mr. Lee: We object to a statement of what he was told about Dr. Fincher there.

The Court: You did go to this doctor. What doctor?

Witness: Dr. Fincher.

[fol. 102] The Court: How long did you stay there?

Witness: Stayed from the 2nd of September to the 7th. I was released on the 7th.

The Court: Well, did you get any better?

Witness: No, sir, I didn't.

Q. What did they do with you over there?

A. Didn't do anything except take two x-rays.

The Court: There is no claim in this suit about any mistreatment of the doctors.

Mr. Pettus: Oh, no, your honor.

The Court: The only claim here is he was injured.

Mr. Pettus: That's true, your honor.

The Court: The only thing, while he was there, is whether the treatment had any effect, or whether the man was still disabled or not.

[fol. 103] Mr. Pettus: Your honor, that is true; the man didn't have his leg cut off. If he had, we could look and see it. Here's an unusual condition and unusual injuries, and it is necessary to show the railroad doctors in their efforts. We don't question their efficiency and good faith, but it is necessary to show the injuries.

The Court: I don't believe in taking up valuable time in going into details.

Mr. Pettus: We are not going into details.

The Court: Just the treatment and what was the result, and that's all the evidence that is important.

Mr. Pettus: Yes.

Q. Whatever the treatment, down in Atlanta, did Dr. Fincher do it?

A. Yes, sir.

Q. Do you know his name?

A. Nothing but Dr. Fincher.

Q. Well, that was his name, Dr. Fincher?

A. Yes, sir.

Q. That was the doctor you were sent to by Dr. Ellis and carried by Mr. Davis?

A. Yes, sir.

Q. Whatever treatment he gave you there—when you got there you were not cured? You nod your head. He can't see you. Were you cured when you were there?

A. No, sir, was not.

Q. Were you any better off?

[fol. 104] A. Beg pardon?

Q. Were you any better off, as far as you could tell, your physical condition?

A. No, sir, was not.

Q. What happened after that?

A. I came back to Panama City, and I won't be pos-tive just the date Mr. Davis called me from the desk—I don't know; either back in Panama City or—and Mr. Davis called me at the depot and asked me if I would come down.

Mr. Lee: We object to any conversation with Mr. Davis.
The Court: Mr. Davis was the head employee here?
Mr. Pettus: Right here.
The Court: Overrule the objection.
Mr. Pettus: All right.

A. (continuing): So Mr. Davis asked me did I feel like coming down to Dothan. I told him I would be down as soon as I could get someone to carry me down. So Mr.——
Q. All right. You went down then?
A. Yes, sir.
Q. What did Mr. Davis say?
A. Asked me what Dr. Fincher told me.

Mr. Lee: We object to that. Not any question of what Mr. Davis told him.
[fol. 105] The Court: Overrule.
Mr. Pettus: On the question of injury, if the court please.

Q. What happened? Did you have any further treatment after that?
A. Nothing but Dr. Ellis—no, sir.
Q. Well, did Dr. Ellis treat you after that?
A. No.
Q. He did not treat you any further?
A. No.
Q. Dr. Nixon see you or treat you any further?
A. Dr. Nixon has seen me every day—every five to seven days from that time, yes, sir.
Q. I will ask you to state whether or not Dr. Nixon each week filled out your disability insurance report?

Mr. Lee: We object to the making or filling out of the insurance reports. Has no bearing on this case; not germane to the issue.
The Court: Who filled out the report?
Mr. Pettus: Dr. Nixon wrote it down.
Witness: Dr. Nixon.

The Court: Well, I don't see what that has to do with it.
[fol. 106] Mr. Pettus: It's a question of showing disability.

Q. Well in other words, you saw Dr. Nixon each week?
A. Yes, sir.
Q. Does he give you any further treatment?
A. Nothing more than dope.
Q. Just to ease your pain?
A. Yes, sir. That's all.
Q. Now, Mr. Carter, what was your position with the railroad company at the time you got hurt, on this particular train? Get down to this train.
A. Trainman.
Q. Trainman. You were what they call swing man in the switching operation?
A. Yes.
Q. You remember after the train was made up, and after Morrison—Mr. Whitten left and went to the shanty, did he give you messages about the train moving?
A. Yes, sir.
Q. Mr. Morrison was the footboard man on the engine?
A. Yes, sir.
Q. And Mr. Grant was the engineer?
A. Yes, sir.
Q. Diesel engine. Do you remember when a box car, after the train was made up there, a box car was just next the engine and other cars were in front of it?
A. Yes, I do.
Q. Before that time, you recall parking this L&N car down there on the main line? You remember when you spotted it there?
A. Yes, sir.
Q. Just tell of the way it was spotted down there at that point. Just exactly what you did.
A. Footboard man Morrison had the train to move, and those other cars, and I cut the angle cock there on [fol. 107] the car and reached down and taken the hose and cut the air. I taken the cock on the car, which was car L&N 20042, and turned it slow, which lets the air out of the car and sets the car.
Q. Is that the way you set the air, by letting it out?
A. Yes, sir.
Q. You turned the angle cock and let it out, and that would set the air brake on this car?
A. Yes, sir.
Q. You had it on?
A. Yes, sir.

Q. And it's regular railroad procedure?

A. Yes, sir.

Q. What did you do coupling on, the pin?

A. I pulled the pin, set the pin back, and started on to Pledgers Crossing.

Q. What did you do with the engine?

A. He came after and got one box car of wood, then come back. That's all he did.

Q. You got that box car near the engine?

A. Yes, sir.

Q. And you told him to go back and get the woodrack?

A. Yes, sir.

Q. And then when he backed on the main line with the box car next to it, and the wood racks, what we call flat cars, up in front.

A. That't right.

Q. How did you get back, then to this L&N car?

A. Just walked back across.

Q. How did Morrison get back?

A. Morrison got on the train and went back.

Q. With this outfit, with this engine backing up—I mean, the engine pushing the cars in front of it, the engine was headed this way?

A. Yes, sir.

[fol. 108] Q. From the right-hand side?

A. Yes, sir.

Q. But it had these wood cars, pushing them?

A. Yes, sir.

Q. And the box car next to the engine, and the next wood racks?

A. Yes, sir.

Q. When you got down there where you were ready to make the coupling, what did you signal?

A. Footboard man gave a slow signal.

Q. Did he give a slow signal to the engineer?

A. Yes, sir.

Q. Where was he?

A. He was down on the ground.

Q. What happened?

A. When the cars came together, they didn't couple. When the cars came together, I signed down naturally, and the train was stopping. Well I looked at this 20042. It was rolling.

Q. It was rolling?

A. That's right.
Q. It was not coupled?
A. Yes.
Q. The coupler didn't connect up?
A. No.
Q. What happened at that time? The car stopped?
A. Yes, sir. Moving off.
Q. What was your duty with reference to the moving car at that time?
A. My duty was to catch the car and set the brake on the car.
Q. Did the car have a hand brake on it?
A. Did it have a hand brake on it?
Q. Yes.
A. It had a wheel up there.
Q. Well, a hand brake? Did you have and air?
[fol. 109] A. No, sir. That's right.
Q. How far did you run to catch the car?
A. I judge fifty or sixty feet.
Q. You did catch it, and got on it?
A. Yes, sir.
Q. Which end was that hand brake on?
A. On the south end of the train.
Q. What did you do when you got on the car?
A. The bulkhead——
Q. Tell us what the bulkhead is. I don't know what it is.
A. Two platforms come here, and the bulkhead between this. The brake sits on top of that bulkhead.
Q. In order to reach the brake, and turn the wheel, did you have to straddle the bulkhead?
A. There's a little platform down here—I don't know how long it is. I couldn't get both my big feet on it. So I had to put one on it and one straddle of this car to put the brake on.
Q. Did it stop immediately?
A. No, sir.
Q. Was it loaded?
A. Pulp wood.
Q. When you straddled the bulkhead, what did you do with the wheel?
A. I looked back up at the train. My car was beginning to leave the main line, of course, off in this lead track, and I see a light back there.
Q. Was your car going on a curve?

A. Yes, sir, it was going on a curve.

Q. How far was the train back from you at that time, the nearest end of it?

A. Well, I judge around possibly two cars.

Q. Two car lengths back?

A. Yes, sir.

Q. Could you see it coming on?

A. No, I couldn't see the train because it was dark.

[fol. 110] Q. Did you see any light.

A. Saw a light.

Q. Where was the light?

A. Back up at the train.

Q. Did you given any signal, or were you able to give any signal, to the engineer like that?

A. I give a signal come up like this and over like that. That was for the footboard man to come down where he could see me around this curve.

Q. Around the curve?

A. Yes, sir.

Q. Did you get any response from that signal?

A. No.

Q. Were you already turning around the curve?

A. Yes, sir.

Q. From where you were, if the footboard man—if he had been on the train could — have seen that signal?

A. Yes, sir.

Q. You think he would have seen it?

A. No, sir.

Q. Got no response to the signal?

A. No reply to the signal. So far as I known, nobody saw the signal.

Q. Nobody saw the signal, so far as you can tell?

A. It wasn't answered.

Q. Had you brought the car to a stop at that time?

A. When I give the signal?

Q. Yes.

A. No. Car was coming down the main line.

Q. How far had you gotten off the main line?

A. I reckon six cars.

Q. Downgrade?

A. Yes, sir.

Q. Could they see your light or signal after you turned around the curve?

A. No. sir.

[fol. 111] Q. After you got around the curve, the enginemen could not see your light?

A. No, sir.

Q. Could you see their lights after you turned the curve?

A. No, sir.

Q. What was the next thing? What did you do?

A. When I brought the car to a stop, I was sitting sideways and there was the train, approximately 20 feet from me.

Q. Coming on?

A. Coming on.

Q. Do you know how fast it was coming?

A. I could not say.

Q. What would you say in your judgment?

A. I would say twelve to fifteen miles an hour.

Q. What did you do?

A. I grabbed the brake wheel, and time I clinched it, then it hit.

Q. What happened?

A. I guess it threw me up in the hold.

Q. We don't know what the hold is.

A. The car hit so hard, it knocked this car down with me and knocked the wood back up and threw me in this hold.

Q. That left a spot for the load to shift back against you?

A. Yes, sir.

Q. What was in the hold? Was it a soft base, or hard floor, or what?

A. Three or four pieces of wood down in there.

Q. Anything else?

A. That was all.

Q. Did you land on your back, head, shoulder, or what? What did you land on when you hit the hold?

A. Could not tell you about that.

[fol. 112] Q. Did you fall backwards?

A. I think so.

Q. The movement of the car would have forced you back?

A. Yes, sir.

Q. And you did, in the car?

A. Yes, sir.

Q. In your best judgment, how far did you fall?

A. About six feet, in the oil and all.

Q. What was the next thing that happened?

A. Well, I got on the ground.

Q. Well, after it hit and made the couple, was there any other movement?

A. I couldn't tell you about that.

Q. When you were knocked in the hold, did it move your car forward any?

A. I couldn't tell you. It was all just a lick, just a few minutes; I guess I was dazzled, you know, in a daze.

Q. Did any wood fall on you when it stopped?

A. It was slacked and pulled the wood back against me.

Q. What do you mean by slack?

A. Slack is in the knuckles.

Q. First hit it and when it took up the slack it pitched the wood back there where you were?

A. Yes, sir.

Q. How did you get out on the ground?

A. I couldn't tell you.

Q. Did you get out on the ground?

A. Yes, sir.

Q. Did you feel any injury?

A. Yes, sir. My leg, my foot and my hip was hurting me.

Q. What did you do?

A. By the time—the first thing I remember, Mr. Morrison spoke. He says, "Carter, are you hurt?" I says. [fol. 113] "Yes, Tommy, I am hurt. My leg is hurt, my hip." Says, "I don't know how bad I am hurt."

Q. Did you attempt to go on working?

A. Yes, sir. I lined up No. 20042 and the rest of this wood—I don't know what the numbers was—and shoved them in there and tried to couple this 20042 to a couple of flat cars in there. It missed coupling three or four times. I won't be positive which.

Q. This same car missed coupling three or four times?

A. Yes, sir.

Q. That was the one involved in this transaction?

A. Yes, sir.

Q. Then what happened?

A. Mr. Morrison cuts off the flat cars and goes to this box car. I was leaning up against this little shed by the track, leaning up against the shed, and Mr. Morrison cuts the box off and comes back and brings it back across what we call the pine track.

—. Then what happened to you?

A. I walked over to the main line, and Mrs. Morrison, I believe—I told him I was hurt, and he asked me how

bad I was hurt. I told him my foot hurt. I sat down. He sat down by me and he pulled my left shoe off, and my ankle was bruised, and pulled; my foot hurt. I sat down. He sat down by me and he pulled my left shoe off, and my ankle was bruised, and he pulled my overall leg up and it was skint on both legs underneath, and Mr. Whitten taken me to first aid over in the Southern Craft Yards.

Q. What did they do to you then? What treatment did they give you?

A. The nurse told Mr. Whitten to send me to the hospital, the first day.

Q. Were you carried to the hospital then?

A. Yes, sir.

Q. Any of these cars you had charge of there, were any of them in interstate commerce? Have out-of-state loads? Any of these cars being handled there?

[fol. 114] A. Yes, sir.

Q. What percentage of them?

A. That night we picked up four cars.

Q. Where did they go?

A. Two to the Airline and two of the Central Georgia.

Q. Did they go out of the state?

A. Yes, sir. Car to Dalton.

Q. About how much of the work you were working with at that time were going in interstate?

The Court: Unless the defendant denies that question, I don't see any use of any answer.

Mr. Pettus: No question about that.

Mr. Lee: I admit it in my answer.

Q. Now, at the time that this first attempt in coupling was made there, when it didn't couple, where the car was first spotted out there, when you found it out there, had you opened the knuckles and had it all ready?

A. Yes, sir.

Q. On that car, and the others you were to connect out there?

A. Yes, sir.

Q. Everything you should have done was done?

A. Yes, sir.

Q. And that should have coupled?

A. Yes, sir.

Q. But it did not?

A. No, sir.

Q. Was that a bad order car?

A. Mr. Nichols told us that in picking up——

[fol. 115] Mr. Lee: We object to any statement made by Mr. Nichols.

The Court: Sustain the objection.

Q. Who is Mr. Nichols?

A. General superintendent.

Q. If the automatic brake on that car had been working right, would it have rolled down the hill?

A. No.

Q. What you did when you put the car there: When you spotted the car you did what was necessary to set the brake, setting the air brake on it?

A. Yes, sir.

Q. I will ask you if those automatic brakes had been working, and if the air had been holding on this car when the train backed in to make the coupling, would it have moved it off, or how far, if the brakes had been up on the car?

A. No faster than the air coupling there. I don't believe it would have knocked it more than four or five feet, if that far. In fact, if the brake had been set up on the car, it never would have gone.

Q. Would not have gone?

A. No.

Q. At the time how much were you making, as an average?

Mr. Lee: You mean with the defendant company?

Mr. Pettus: Yes.

Mr. Lee: We object. The evidence is already in.

[fol. 116] The Court: Already got it in.

Q. Have you made any earnings since then?

A. No, I have not.

Cross-examination.

By Mr. Lee:

Q. In spite of your pain you suffered and loss of sleep, and everything else, you have still gained five or six pounds since the date of this accident?

A. Yes, sir.

Q. You were examined by the army prior to this accident and returned rejected, were you not? Physical reasons?

A. Yes, I was.

Q. Now, Mr. Carter, who sent you to Birmingham on March 16th after this accident occurred on February 2nd?

A. I went to Birmingham of my own free will.

Q. You went to Birmingham and were examined by Dr. Thuss freely?

A. Yes.

Q. Did you ever report that to the defendant's doctor, or any of defendant's doctors, that were treating you?

Mr. Pettus: We object. Immaterial.

The Court: Overrule.

Mr. Lee: Very material.

[fol. 117] Q. Did you?

A. No.

Q. You were seen down there by Dr. Nixon, seen here, by Dr. Ellis, sent to Atlanta to see Dr. Fincher. When you were in Atlanta did you see Dr. Fincher?

A. Yes, sir.

Q. Mr. Davis came up for you, and you left that day before he got there, in September, didn't you?

A. Yes, sir.

Q. How did you come back from Atlanta?

A. By bus.

Q. By bus. Was anybody with you?

A. No.

Q. You rode and made the trip by yourself?

A. Oh, there were passengers on it.

Q. I mean, anybody accompanying you?

A. No, sir.

Q. When you went to Birmingham, how did you travel?

A. By bus.

Q. Anybody accompany you?

A. No.

Q. By yourself?

A. Yes.

Q. This night when you were engaging in these switching operations, when Mr. Whitten went in that shack and he gave you instructions and turned the train over to you to carry out those instructions as to switching, did he not?

A. Yes, sir.

Q. You were in charge over there?

A. That's right.

Q. Mr. Morrison brought that train out on the main line in the inside storage track, then was right before this coupling was attempted with L&N 20042?

A. Yes, sir.

[fol. 118] Q. You tell this court and jury you set those brakes on that car before going in that inside storage track, that is, when you first put it on the main line there?

A. Yes, sir.

Q. The brakes had been working on 20042 before that time?

A. Not that I know anything about.

Q. They were coupled up and you had your air brakes on it before you cut them lose?

A. I could not say whether the air brake coupling was on it.

Q. You couldn't tell the jury whether they were working or not.

A. No.

Q. Didn't you couple it up?

A. I coupled it up.

Q. You coupled it up, and when the coupling finally was made you coupled it again?

A. I didn't know whether the brakes were on.

Q. I didn't ask you that. You told Mr. Pettus on direct examination that that car would not have moved if those brakes had been working. That is true, isn't it?

A. Correct.

Q. And in spite of the fact that that car moved when you got down there and had a couple to miss the air friction on 20042, and took it all the way to the main track with the brake couple?

A. Correct.

Q. Why did you couple it?

A. That was what question?

Q. You coupled it, even though it wasn't working.

A. I didn't know it wasn't working.

Q. You saw the car move off?

A. Yes, sir.

Q. You saw the car move off, and yet you didn't know they were not working when you had set the couple brakes when you puut the car out on the main line?

[fol. 119] A. I knew it after.

Q. I say you coupled those brakes when that coupling was made down there knowing at the time that car had moved off on the main line when the coupling was attempted and missed there before? You knew of that?

A. I had turned the air out.

Q. I am talking about down there after the coupling was made. You coupled those brakes knowing at the time you had set the brakes up there on the main line and that a coupling had been attempted and missed?

A. That's right.

Q. Now when Mr. Morrison brought that train back out on the main line and came back from the inside storage track on the main line there, you signaled them ahead?

A. Yes, sir.

Q. Come ahead to make the coupling?

A. Yes, sir.

Q. They came in there, and the coupling was attempted?

A. Yes, sir.

Q. How fast was that train going when the coupling was attempted?

A. Very slow.

Q. Was both knuckles open; or just one?

A. Both were open.

Q. You opened both knuckles, didn't you?

A. Yes.

Q. Don't you know, as a matter of fact, a coupling can be made much better with just one open?

A. Well, I don't know.

Q. I ask you as a matter of common knowledge, don't you know a coupling will be made better if one is open and set on that coupling?

A. That is not a fact of common knowledge. Two opened.

Q. Open both of them?

[fol. 120] A. Yes, sir.

Q. Don't you know, as a matter of fact, couplings are sometimes tried more than once before they connect up?

A. I don't know about that.

Q. Haven't you missed?

A. Yes, I have missed.

Q. There wasn't anything gone wrong with the coupling, so far as you knew? When you went on down, this coupling was working on the car okay?

A. It had been coupling.

Q. After the coupling had been missed, you say you ran fifty or sixty feet when it was still moving off?

A. That's right.

Q. Then you caught hold of the car. During that time the car was stopping?

A. Yes.

Q. Did you signal J. L. Grant, the engineer on the train, ahead?

A. I signaled the footboard man.

Q. Wasn't Mr. Grant ahead? You don't mean to say, having worked two years on the track, you couldn't tell the court and jury whether you were in sight of the engineer?

A. I could not say whether the engineer was looking at me or not.

Q. You ran sixty feet and gave a come ahead signal?

A. Asked the footboard man.

Q. I asked did you give a come ahead signal, in railroad parlance?

A. I give a signal.

Q. That's what I want. Give a signal to come ahead with your lantern?

A. I signaled the footboard man to come on.

Q. J. L. Grant, engineer on the trains acknowledged his signal and moved his train forward?

A. Suppose he did.

[fol. 121] Q. Well, did he or not?

A. Evidently he did. He hit me down there.

Q. I didn't ask you that. I said did he acknowledge that signal?

A. Must have.

Q. As you rounded that curve, you saw the footboard man?

A. Yes.

Q. You gave a statement to Mr. R. L. Adams, and also in answer to interrogatories propounded?

A. Yes, sir.

Q. And don't you know you stated in the statement made to Mr. Adams and in answer to the interrogatories made in this case you also stated, to each one of them, that from

the time you gave the come ahead signal after you got on this car you never gave another signal until this coupling had been made down there?

A. That's correct.

Q. You didn't signal the footboard man to come around——

A. The signal I give——

Q. Just answer my question. At the time you signaled ahead, and the time that coupling was made, did you ever give another signal with reference to the operation of this train?

A. No.

Q. You did not?

A. No.

Q. Now, L & N car 20042 was fully loaded, wasn't it?

A. Yes, sir, it was.

Q. Look at that picture and see if that's L & N car No. 20042?

A. That is it.

Mr. Pettus: We object to it, unless it was the same condition it was then.

[fol. 122] Q. Is it in the same condition it was then?

A. I would think so.

Q. It was full. Did it have that much wood on it?

A. To see the way I was standing on the end of this bulkhead here, I would say it did.

Q. That's what they call a brake step, right on this end there?

A. Yes, sir.

Q. It is the step where brakemen who operate this automatic brake stand?

A. Supposed to stand there.

Q. You didn't stand there, except with one foot?

A. I couldn't get on it.

Q. You tell the jury you couldn't get your two feet up on this board?

A. No, I couldn't.

Q. How wide is it?

A. I couldn't tell you.

Q. How many times have you ever stood on the brake step on a car like L & N 20042? How many times did you brake one of those series of cars?

A. Well, I couldn't say.

Q. Well, you have done it more than this one occasion?

A. Yes, sir.

Q. And you are familiar with this type of cars?

A. Yes, sir.

Q. It is equipped with automatic couplings? It was at that time? That car was equipped with automatic coupling?

A. Yes, sir.

Q. There is a hand lever there that's hooked to the automatic coupling where you would lift the knuckle, what you call lift the pin, when you cut them apart?

A. Yes, sir.

Q. And that's the hand brake you were operating, and when you were operating the hand brake you hand your [fol. 123] right foot on the brake stand here and had your left foot up across there, up on that load of wood?

A. Yes, sir.

Q. With the car running loose down in that railroad yard?

A. That's right.

Q. And after you had given the signal to the engineer to come ahead, or to the footboard man to come ahead, and that signal had been answered, and the train moved forward?

A. Yes, sir.

Q. You tell the jury when the lick hit down there, as I understand you on direct, that that wood fell down there and there were two or three cords of this wood?

A. Two or three sticks.

Q. How many sticks fell off of this car?

A. I couldn't tell you.

Q. You don't know whether any fell off or not?

A. I couldn't tell you.

Q. When the car stopped, when it was hit, you fell down in there?

A. Yes, sir.

Q. You don't know whether any wood fell off the car?

A. Yes, sir.

Q. Then the wood moved back toward you?

A. Well, I didn't know—never was under the wood.

Q. Between the time of the accident and the wood shifting, and that swack happened, and you got out of the car——

A. No.

Q. You were down under that bulkhead?

A. The train hit the car and pulled the wood back this way.

Q. Pulled the wood back this way?

A. Threw me in here.

[fol. 124] Q. Never did turn the car loose?

A. No.

Q. Couple held it?

A. Yes, sir.

Q. All right. After the time it went back there, did it shift back to the bulkhead?

A. It didn't shift back to the bulkhead, no. There was an open space in here—best I remember, there was three or four pieces of wood on the side, where I had to step off on the end.

Q. You mean after the slack came out of it, it didn't shift back to you?

A. No, it didn't shift back toward me.

Q. There was a vacant space down there under the bulkhead at the time, and don't know whether any wood fell off?

A. No.

Q. You don't know how many sticks of wood fell off?

A. No.

Q. Do you know how much wood was on this car, Mr. Carter?

A. No, I don't.

Q. Mr. Carter, when this coupling was made down there, I believe you stated on direct examination the automatic couplers went together and the coupling was made?

A. Yes. When it hit.

Q. That's what I am talking about.

A. Yes, sir.

Q. At that time, how fast was that train traveling?

A. I judge between twelve and fifteen miles per hour.

Q. That's your judgment and opinion, and you state to the Court, under oath, that the train was traveling too fast?

A. Yes, sir. My best judgment.

Q. You saw Mr. Morrison immediately afterwards, did you not?

[fol. 125] A. Yes, sir.

Q. How far did that car travel after this coupling was made there, traveling at that rate of speed? How far did L & N car 20042 go?

A. I couldn't tell you.

Q. You don't have any judgment or idea?

A. No.

Q. You cut off that car, connect the air brake, took it down on the crane track, and still you can't tell the court and jury how far that car traveled?

A. I understood you to say how far it traveled on the crane track?

Q. That's what I mean.

A. I couldn't say.

Q. But you did take the car on down?

A. Yes, sir.

Q. That's when you saw Morrison?

A. At the impact.

Q. You didn't make any report that you were hurt to Mr. Whitten, did you?

A. I didn't know where Mr. Whitten was, more than he told me he would be in the shack.

Q. How far is it from that point on down to the crane track, Mr. Carter.

A. Well, I would judge it to be three or three hundred and fifty or four hundred yards. Possibly farther.

Q. This was in the night time?

A. Yes. Possibly farther.

Q. After you got on this train—I mean on this L&N car 20042—as she was rounding the curve, in that track,—track No. 3, that's where she was?

A. That's right.

Q. Going out of the sight of the engineer—well, before getting to that, you never were in the sight of the engineer of that cut of cars?

A. No.

[fol. 126] Q. You never were?

A. No.

Q. Mr. Carter, don't you know, as a matter of fact, Mr. Morrison didn't see your come ahead signal?

A. I can't help that.

Q. I didn't ask you that. I said don't you know, as a matter of fact, Mr. Morrison didn't see you, and Mr. Grant, the engineer, didn't know about that?

Mr. Pitts: We object to that. He couldn't know that.

A. No, I don't know.

Q. Before you went around the curve did you give any signals to stop that train, after you had given your come ahead signal?

A. No. I was out of sight.

Q. I didn't ask you that. I asked you from the time that coupling was missed until you got to that curve, did you give any stop signal?

A. No.

Q. But you did give a stop signal——

The Court: Gentlemen, we are taking up too much time.

Redirect examination.

By Mr. Pettus:

Q. The come ahead signal, he did come back slowly?

A. Yes, sir.

Q. Was Mr. Davis late on his trip to Atlanta?

A. Yes. Dr. Thuss told me on Saturday morning I was released from the hospital.

Q. Dr. Thuss?

[fol. 127] A. Dr. Fincher. And he told me some of the officials would be after me Sunday morning, and I waited until six o'clock Sunday night, and had not anyone called, nor anyone come after me, and I called——

Mr. Lee: We object to any calls made there.

The Court: Let him answer the question. He can answer it.

Q. Now, so that the jury can understand it, when a car that's working air is in a train line, it gets the air pumped from the train line, from the engine, does it not?

A. Yes, sir.

Q. But when it is spotted, you have to save it with a little drum on the cars? That's what sets up the brake?

A. Yes, sir.

Q. By riding the drum, it sets up the brake, and that's what you did in this case?

A. Yes, sir.

Mr. Lee: We object to that.

Mr. Pettus: That is all.

Mr. Lee: Judge, I want to ask him one more question. Not about anything I have gone over.

[fol. 128] Recross-examination.

By Mr. Lee:

Q. Mr. Carter, when you were sent from the Frazier-Ellis hospital to Panama City on the date you testified about to Mr. Jackson—I mean, to Mr. Pettus—you were sent there at your request, were you not?
A. Yes, sir.
Q. You requested to be sent there?
A. Yes, sir, I did.

The Court: Take a few minutes recess.

Plaintiff resumed the stand.

Mr. Pettus: Your Honor, I forgot to ask one question of Mr. Carter.

Redirect examination.

By Mr. Pettus:

Q. He asked you about the army rejecting you. Do you know what ground you were turned down on?
A. Migraine colds.
Q. Migraine headaches?
A. Yes, sir.

The Court: Come down.

Q. This bulkhead: What is it call the bulkhead?
A. This right here.
Q. This front end?
A. Yes, sir.

[fol. 129] Q. There is a bulkhead on the outside, and you had to straddle that in order to put the brake on?
A. Yes, sir.

Witness excused.

The Court: Call your next witness.
Mr. Pettus: We rest.
The Court: Call your first witness for the defendant.

Defendant's Case

Mr. J. L. Grant, a witness for the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Your name is J. L. Grant?

A. Yes, sir.

Q. You are an engineer with the Atlanta and Saint Andrews Bay Railway Company, are you not?

A. Yes, sir.

Q. How long have you been an engineer for the defendant company?

A. Twenty years.

Q. Were you the engineer on this switching operation on the night of February 2, 1946, in which it is said Mr. Neroy Carter was injured?

A. Yes, sir.

[fol. 130] Q. Who-all composed the members of that crew? Who all made up that crew?

A. James was the fireman, Whitten was conductor, Carter was trainman, and Morrison——

Q. In other words, a five-man crew of you and James in the cab of the engine, Mr. Whitten was the conductor, and Mr. Morrison was footboard man, and Mr. Carter the trainman?

A. Yes, sir.

Q. Mr. Grant, you recall this switching operation that night, do you not?

A. Yes, sir.

Q. Do you recall when L. & N. car No. 20042, a wood rack car in question in this case,—do you recall when this car was first set out on the main line?

A. Picked up the flat car of wood and set it out.

Q. What you call a wood rack car, loaded with wood?

A. That's right.

Q. L. & N. car No. 20042?

A. It was a car of wood. I don't know the number.

Q. You set it out on the main line?

A. On the main track, yes, sir.

Q. Who set it out there?

A. I don't recall who picked the car up, or who made the coupling. We set the car on the main line.

Q. You cut it off on the main line?
A. Yes, sir.
Q. Mr. Carter was trainman on this crew?
A. Yes, sir.
Q. After you set this car out, did you go anywhere and pick up some more cars?
A. Back to the storage track and picked up some more cars, and coupled this car on the main track.
Q. As you approached the car you had set out on the main track, the wood rack car, did you receive a signal from anybody?
[fol. 131] A. Yes. I received a signal, slow along, coupling to be made to this car.
Q. Who did you receive that signal from?
A. Mr. Carter.
Q. Mr. Carter was the field man on that operation?
A. I guess that's what you would call him, field man.
Q. All right. Did you proceed along then on receiving the signal.
A. Slow signal; coupling up.
Q. How fast were you going at the time?
A. Very slow.
Q. Could you estimate it?
A. Let me think. Stand still after we coupled to it.
Q. Stand still after you coupled to it?
A. Yes, sir.
Q. After that did you receive any signal?
A. Go -head signal.
Q. Who did you receive that signal from?
A. Mr. Carter.
Q. You are positive as to that?
A. That's right.
Q. Mr. Grant, at that time did you know whether or not that coupling had been made?
A. I did not.
Q. What did that train do at that point?
A. It moved on towards the woodyard.
Q. All right. As it moved on towards the woodyard, at what speed did it travel?
A. It was traveling approximately around six miles an hour.
Q. Did it ever exceed that speed?
A. I don't think it did.
Q. That's your best judgment?

A. I was checking the speed, as it was moving around the curve.

Q. As you were moving around the curve you were checking the speed?

[fol. 132] A. That's right.

Q. What was the next thing that came to your attention?

A. Mr. Morrison moved from around those cars and signaled me down, and I immediately applied the brakes and stopped.

Q. You immediately applied the brakes and stopped. Now, Mr. Grant, at the time you applied—at the time you got this signal from Mr. Morrison, how fast was that train traveling?

A. I say about six miles an hour.

Q. Mr. Grant, I believe you testified, in answer to the last question, that the speed at which you were traveling at the time you received the signal from Mr. Morrison, the footboard man, was approximately six miles per hour? That's your best judgment and opinion?

A. When I received the signal to stop?

Q. When he signaled you down?

A. That's right.

Q. After you received that signal, you say you applied your brakes?

A. That's right.

Q. How far in your judgment did your train travel, after you applied the brakes, before it came to a complete stop?

A. I think somewhere around sixty feet.

Q. That's your best judgment and opinion?

A. That's right.

Q. During that time it traveled this fifty (?) feet, Mr. Grant, was there anything that happened with reference to that car—I mean, that train—such as a jolt or impact with any other object that was called to your attention by the movement of that train as engineer of it?

A. I didn't feel anything any jolt or jar of any description that would lead me to believe——

[fol. 133] Mr. Pettus: We object to that: what led him to believe.

Mr. Lee: I think it's a shorthand rendition.

Witness: I didn't feel any jar on the application of the brakes.

Q. Was there any jar at the time you received the signal until you came to a complete stop? Was there any jar on the engine?

A. Was not on the engine.

Q. Was not on the engine. I believe you testified you were an engineer on this line for approximately twenty years?

A. That's right.

Q. During that time you have engaged extensively in switching operations?

A. Switching and road service.

Q. I'll ask you if, in your judgment and opinion as an engineer of a railroad train—if you had hit or made contact with a car traveling at a speed of ten to twelve miles an hour, would you have felt it in the engine, would it have been an appreciable jar?

Mr. Pettus: We object to that.

The Court: Overruled.

Mr. Pettus: We except. Incompetent, irrelevant, illegal, immaterial, improper, opinion evidence.

[fol. 134] Q. Go ahead.

A. What did you say?

Q. The train you had on that cut of cars?

A. Yes, sir.

Q. Would it be slight or hard?

Mr. Pettus: We object.

The Court: Overruled.

Mr. Pettus: We except.

A. Coupling to a car, with eight or ten cars, I would say yes. You would receive a jolt with six cars.

Q. Traveling at five or six miles an hour would, you feel the result?

A. Yes.

Mr. Pettus: We object to that on the same grounds.

The Court: Well, he said he didn't have much judgment on whether it would be smooth or not. Overruled.

Q. Do you have a judgment as to whether it would be smooth or slight?

Mr. Pettus: We object to that.

The Court: If you have a judgment, say so.

[fol. 135] Q. Would it be a heavy or light jar?

A. Coupling one car, I would say it would be a light jar, with ten cars.

Q. After you brought the train to a stop did you get another signal?

A. I did.

Q. What was the signal?

A. Proceed ahead.

Q. Who did you get that signal from?

A. I don't know.

Q. I will ask you to just go back a point or two. Mr. Grant, after this first coupling, after the testimony about where you got the slow and ahead signal from Mr. Carter, and then the come ahead signal, the come ahead signal from Mr. Carter, after the slow and ahead signal, did you acknowledge that signal to Mr. Carter?

A. I don't recall whether I did or not. Just a general recollection of the accident, and I would not recall.

Q. You would not say?

A. No; would not say whether I did or not.

Q. After you got the last signal to go ahead where did you go?

A. Woodyard. Spotted cars up in the woodyard.

Q. Spotted cars up in the woodyard. All right. Did Mr. Carter go on with you on that switching operation?

A. Yes, sir.

Q. Did you later see Mr. Carter?

A. After we spotted the cars in the woodyard.

Q. After you spotted the cars in the woodyard, where did you see him?

A. He was not on the front end of the engine. Best I remember, he was somewhere near—I believe—the other trainman. I can't think of his name right at present——

Q. Was he a member of the crew?

A. Yes, another trainman.

[fol. 136] Q. Mr. Whitten?

A. No.

Q. Mr. Morrison?

A. Mr. Morrison. I believe Mr. Morrison made the cut-off from the engine, spotting the last car, the best of my recollection.

Q. Yes, and Mr. Morrison made the last cut-off, after he spotted the L & N car in the woodyard?

A. Yes, sir.

Q. The time you first saw him?
A. Yes, sir.
Q. Did you know at any time from the time Mr. Carter gave you the slow and ahead signal out on the main line until you got off in the woodyard, the coupling had been missed?
A. I did not.
Q. Was Mr. James with you at all times on the engine?
A. Yes.

Cross-examination.

By Mr. Pettus:

Q. Mr. Grant, what sort of engine did you have?
A. We have a Diesel electric engine.
Q. What size?
A. What size engine? I don't know whether they go in sizes. Just a Diesel electric engine.
Q. Little engine or big engine, heavy engine?
A. I don't exactly understand the question.
Q. Well, I will withdraw it.

The Court: How heavy was it?
Witness: It was 120 tons, on this engine.

[fol. 137] The Court: What kind of service?
Witness: It was the switching type.

Q. Do you know what it weighed?
A. 120 tons, the best I remember.
Q. It weighed 120 tons. Where did the engineer sit on the Diesel engine?
A. Right-hand side on the engine. That's in the cab.
Q. Comparable to a locomotive cab?
A. Yes, sir. It is.
Q. I will ask you to state if you headed forward the engineer was on the right-hand side?
A. I was headed forward and the engineer was on the right-hand side.
Q. You had picked up a box car and had seven or eight flat cars ahead of that before you made your first attempted coupling?
A. I believe we picked up a flat car and set it on the main line.
Q. Well, I am getting past at that point. I am asking you just before you made the attempted coupling, when

you were watching Carter, what sort of cars did you have? Do you know what sort of cars? Do you remember?

A. I don't know.

Q. Did you have a box car in front of you?

A. Best I remember, that wasn't.

Q. Was there a box car in front of the engine?

A. I don't recall.

Q. A box car in the train?

A. I don't believe there was.

Q. You don't know whether you had a box car in front of the engine, or whether there was a box car between you and——

[fol. 138] A. As engineer, we don't check the cars.

Q. You know there was a car ahead of the engine?

A. I was told we had about eight cars.

Q. You were told you had about eight cars?

A. I was told we had ten.

Q. How many box cars were there?

A. I wasn't told.

Q. But you would say there wasn't one?

A. Yes, sir.

Q. As a matter of fact, the box car was ahead of your engine, the way you were pushing it. Looking around this train line, you could see around it?

A. I don't believe I could see around it, unless the cars were around the curve. I couldn't see a ten-car cut.

Q. If the box car was coupled in front of your engine, you couldn't see around the curve?

A. Not if they were all flat cars.

Q. I will ask you if you could see along the side?

A. I can see along the side on a straight track.

Q. In fact, along any train you would have to look around the side of a box car?

A. You would have to look around on flat cars.

Q. You can see a man on cars?

A. If they were flat cars, yes.

Q. You could not see——

A. If he was on top of a box car I couldn't see him.

Q. If there was a box car next to the engine?

A. Yes, sir.

Q. And seven or eight flat cars in front, and he was up on a flat car, on a straight track, you couldn't see him?

A. No, I couldn't see him.

Q. All right. You couldn't see his light or signal?

A. No.

Q. You say when you first came down to make the first coupling on it, and that you didn't even remember the car or load, you didn't see Mr. Carter signal?

A. I didn't see Mr. Carter signal.

[fol. 139] Q. If you would come in and make a coupling?

A. I would not have known it, if the pin fall or not.

Q. As an experienced engineer, and you went in to a car loaded with pulpwood, and failed to make the coupling, you would not have known it?

A. No.

Q. You could have known you bumped the car, but you did not know?

A. I did not know we hit a car, but did not see whether it was coupled.

Q. Did you know after the car bumped off?

A. I have a signal to move ahead, and I moved ahead.

Q. You got the first signal to go slow, make a coupling?

A. Yes, sir.

Q. Carter made that signal?

A. Yes, sir.

Q. Looking at him?

A. Yes, sir.

Q. Night?

A. Yes, sir.

Q. Ten cars away?

A. Five cars away. The other cars were——

Q. Ten cars away, in the night-time. So you saw him and recognized him, and would swear it was Carter?

A. Yes, would swear it was Carter.

Q. Did you see him?

A. Saw nothing but his light.

Q. Is his a different light from Morrison's or somebody else's?

A. No.

Q. All you saw was a light?

A. Yes.

Q. And looking at the man ten cars away, you come and just swear it was Mr. Carter?

A. Yes, it was Mr. Carter.

[fol. 140] Q. You could not know it was Mr. Carter? Could not see the man?

A. No.

Q. All you saw was the point of his lantern? You couldn't see his cap or his uniform?

A. I did see the lights.

Q. Could you tell whether he had on a black suit?

Mr. Lee: We object. Perhaps he didn't see Carter.

Mr. Pettus: I am asking about each signal.

The Court: All those signals were by lights?

Witness: Yes, sir.

The Court: And your testimony was you received a signal from the place of the light he carried?

Witness: That's right.

The Court: You did not see the man?

Witness: I did not see the man at all.

Mr. Pettus:

Q. Well, could Mr. Whitten have given a signal, if he had been there?

A. If he had been there?

[fol. 141] Q. Yes, Any other man could have, couldn't he? All you know is it came from a place where you thought Carter would be?

The Court: Well, we are taking a long time on that.

Q. When you got the slow signal, did you feel a bump?

A. It was a very light couple.

Q. You could feel the jolt of the bump?

A. Getting a slow signal——

Q. I am not asking you about that. When you did hit the car you could feel the jolt?

A. When I got the go ahead signal, I went ahead. There was a lot of slack in there.

Q. Your lawyer can make a speech for you.

Mr. Lee: We object to the statement of plaintiff's counsel.

The Court: When you got the signal to go ahead, and when you got to this car you were going to couple to, could you feel any bump?

Witness: In railr-ading, if you haul ten cars, when you feel a jar it is on all cars.

The Court: That's what he asked you.

Q. But you are giving your opinion on that?

A. Yes, sir. In Charge of ten cars in the train. Now in making a hard coupling, and your slack is all out, and the

engineer applies the brakes, you get a bump; but this [fol. 142] movement, it was moving ahead, ten cars in the train, it was a slight jar.

Q. On that ten-car movement did you feel a bump at two miles an hour?

A. I didn't say at two miles an hour.

Q. You came down, and you said you came slowly, about ten miles an hour?

A. I didn't say two.

Q. You had already set it there?

A. I couldn't say, because it was a very, very slow speed.

Q. Going two miles an hour, you would have received a jar, you tell the jury?

A. Would have received a jar. As a matter of fact, you couldn't tell the difference between two and ten miles an hour.

Q. You couldn't tell it. Were your lights on normally at night? Normal condition?

A. Yes.

Q. When you got the slow signal, and felt the jar, string of cars, you got the go ahead signal?

A. Yes, sir.

Q. What kind of signal?

A. Just raise your hand; raise it.

Q. That means to proceed?

A. Yes, sir.

Q. Did it mean to proceed slowly or fast?

A. Come ahead.

Q. Come ahead slow or fast?

A. I guess to send this car all the way to the woodyard.

Q. Did it mean fast or slow?

A. Restricted speed.

Q. What is restricted speed?

A. Eight miles an hour.

[fol. 143] Q. Did that signal mean come ahead at eight miles an hour?

A. If I wanted to.

Q. When you got that signal, did you ever see any other signal until you had the accident?

A. No, sir.

Q. Did you see his light, or did you see Mr. Morrison's light, after you got this go ahead signal?

A. What are you speaking about?

Q. I am speaking about after you say you made the first coupling, and you say you got a go ahead signal, after you say you got a go ahead signal, did you ever see the lights of Mr. Morrison, or Mr. Carter, either, until just before the accident?

A. Mr. Morrison and Mr. Carter's lights was out, both of them. Carter made the coupling, and Morrison was five car lengths on the side.

Mr. Lee: Been over that two or three times.

Mr. Pettus: We insist in trying our case.

The Court: Go ahead.

Mr. Pettus: I am trying to save some time.

Q. You said you made the coupling and got the go ahead signal and went ahead?

A. That's right.

Q. After this signal was given you, did you see Mr. Carter or Mr. Morrison's lantern any other time until you got down in the woodyard when you rounded the curve? [fol. 144] A. When we went into the curve, Morrison ran out.

Q. I didn't ask you that.

The Court: The testimony shows he got a signal some time after in the railroad yards, and the witness testified as he went around the curve he got a direct answer.

Mr. Pettus: The testimony shows the washout happened just about the time of the accident. I am asking the witness——

The Court: I can't agree with you very much.

Mr. Pettus: I will simplify it. I think your honor will agree with me.

Q. Mr. Grant, you said you got the go ahead signal now, and after you got the go ahead signal did you see the light, not a signal, but did you see the light of Mr. Morrison, or the light of Mr. Carter, at any time until you got the signal from Mr. Morrison just at the time you say you put your brakes on?

A. I did not see any signal.

Q. I am not asking whether you saw a signal. I am asking you whether you saw a light?

A. All right. I did not see one then.

Q. You didn't see the light of either one of them from that time on?

A. No.

Q. In other words, the light disappeared from the time you made the coupling until you got the signal to go ahead?

A. That's the first or second?

[fol. 145] Q. The first one.

A. The first one? You just got through saying you wasn't talking about the first one.

Q. Mr. Grant, you said a minute ago, and I guess you still stand by it——

Mr. Lee: We object to the statement made by the attorney for the plaintiff in this case.

Mr. Pettus: I believe he will stand by it.

Mr. Lee: It is not a question of whether he will stand by it.

Q. Now, you swore you got a slow down signal, to make a coupling, and then you a go ahead signal?

A. That's right.

Q. From the time you got that go ahead signal unti- you saw Morrison's light down there, where he gave you a stop signal, did you ever see the light of Mr. Morrison's lantern, or the light of Mr. Carter's lantern, either, between those two points?

A. The first light rounding the curve went out of sight; the second light rounding the curve went out of sight.

Q. That's all right.

A. And was given then the signal to stop.

Q. How long was it before the first went out of sight around the curve and the second one went out of sight around the curve? How long was it before you got the lights from Morrison?

A. I said running about six miles an hour, the swing man was six car lengths away. Judging the time of that, I couldn't say.

Q. You run ten car lengths?

[fol. 146] A. Moving at six miles an hour, a man on the front end, his lights went out around the curve. I didn't see it any more.

Q. Morrison's light disappeared around the curve?

A. That's right.

Q. As a matter of fact, you could not see Morrison's light aft-r he got up on the train?

A. After he got up on the train?

Q. After this signal was given, coming down on a straight train track, you couldn't see a man on the train?

A. I couldn't see him on a straight track.

Q. I mean up on the train?

A. If he was on the side all along, I could see him.

Q. But on top you couldn't see him?

A. I couldn't see him on top unless he was on the front of the car.

Q. How many car lengths did you run after Morrison's light disappeared around the curve?

A. About one—no, wait a minute.

Q. Before you hit?

A. The engine stopped about clear of the main track.

Q. Well, that put you about ten car lengths?

A. About five.

Q. When Morrison's light disappeared, did you change your speed, or do anything at all?

A. No.

Q. Just kept going, and his light disappeared?

A. It is his duty to come down and signal me down, if necessary.

Q. Just one thing: You didn't know where Mr. Carter was at the time?

A. No.

Q. You didn't know where Mr. Morrison was at that time?

A. No.

[fol. 147] Q. You didn't know where Mr. Whitten was at that time?

A. No.

Q. Only man you knew anything about was this signal man?

A. I could see him up on the other side.

Q. Did you feel any bump when you started off on this occasion——

The Court: Now you are starting off again.

Mr. Pettus: I am talking about the second bump, when he started there on the second bump.

The Court: He has explained about the bump.

Mr. Pettus: I think Mr. Lee asked about the second bump. Your honor has not permitted us to cross-examine on the second bump.

Mr. Lee: I don't want to get in their rebuttal. But I never asked him, as I recall it, about what happened when he hit on this next or the last occasion.

The Court: All right. Go ahead.

Q. All right. Did you feel any bump on this last ocsasion?

A. No.

Q. You did not feel any bump at all?

A. No.

[fol. 148] Q. The signal you got is what you call a washout signal?

A. No, sir.

Q. You put your brakes on?

A. I made a service application.

Q. That means slow, stop?

A. Yes, sir.

Q. How far did you run after you applied your brakes?

A. About fifty feet.

Q. If you had put your brakes on in emergency, you could have stopped in five feet?

A. I would not say I could stop in five feet on no train, because your train brakes would jam.

Q. Could you have stopped on that train in ten feet?

A. I couldn't say.

Q. Do you know how many tons were on the L&N car, pulpwood?

A. How is that?

Q. Do you know how many tons were on the L&N car?

A. I don't know how many tons were on the L&N car.

Q. You are still employed by this railroad?

A. Yes, sir.

Q. You knew you got a summons as a witness for the plaintiff, too?

A. Yes, sir.

Q. When I went out and tried to talk to you, you refused to talk to me, didn't you?

A. Well, I didn't understand anything about Court.

Q. You are vitally interested in this case?

A. I didn't want it.

Mr. Pettus: All right.

[fol. 149] Redirect examination.

By Mr. Lee:

Q. Did you receive any instructions from anybody not to talk about this case?

A. I did not. The Judge said not to talk to anybody.

Mr. Pettus: He said other than the lawyers.

Q. He came to talk to you after the case was started?

A. After the case was started, yes, sir.

Mr. Lee: All right. Come down.

Witness excused.

Dr. John T. Ellis, a witness for the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Your name is Dr. John T. Ellis?

A. Yes, sir.

Q. You live here in Dothan and are co-operator of the Frazier-Ellis Hospital, are you not?

A. Yes, sir.

Q. Are you a practicing physician and surgeon?

Mr. Pettus: Just to save time, we will admit his qualifications; note he is qualified.

[fol. 150] The Court: Yes, as a competent physician and surgeon.

Q. First, I will ask you are you a director of the Atlanta and Saint Andrews Bay Railway?

A. No, sir.

Q. Do you have any interest whatsoever in that company, in any way, form or fashion.

A. No.

Q. You are the chief physician employed by the company to treat employees, are you not?

A. Yes, sir.

Q. You know Neroy Carter?

A. Yes, sir.

Q. In February of last year, Dr. Ellis, did you have occasion to see Mr. Neroy Carter?

A. Yes, sir.

Q. When was the first time that you saw him?

A. February 9, 1946.

Q. Over what period of time did you see Neroy Carter?

A. From February 9th to July 23rd.

Q. To July 23rd. During that period of time, or immediately subsequent to it, did you send Mr. Neroy Carter to any points to be examined by any other physician?

A. Yes, sir.

Q. Where?

A. Emory University, to Dr. Ed. Fincher.

Q. Dr. Ed. Fincher. During this period of time that you examined Mr. Carter, was there made, under your supervision and direction in your hospital here in Dothan, x-ray pictures of his back.

A. Yes, sir.

Q. Doctor, from your examination of him and observation of him during that period of time, and from pictures made of Mr. Carter, did you form an opinion as to what his condition was and make a diagnosis of his condition? [fol. 151] A. Yes, sir.

Q. What was it, please, sir? State it to the Court.

A. He had pain in his left hip, and had bruises of the skin of both of the gluteal regions.

Q. What is "gluteal"? Is that the buttocks?

A. The thing you sit on.

Q. Go ahead.

A. Those bruises were caused from adhesive plaster, and the small scarred place on the gluteal region he said was caused by an accident.

Q. How large was it, or how small was it?

A. Oh, it was small. I don't remember exactly. A five-cent piece to a fifty-cent piece.

Q. What was your other diagnosis?

A. What?

Q. What was your other diagnosis of his condition?

A. He was tender over his sacroiliac, arthritis of the lumbar spine, general deformity of the left lumbar, spondylolisthesis of the fourth lumbar on the fifth vertebra.

Q. He had a deformity?

A. That's right.

Q. What is a congenital deformity?

A. Something you are born with.

Q. You say it is something you are born with?
A. Yes.

Mr. Lee: Take him.

Cross-examination.

By Mr. Pettus:

Q. Have you examined him lately?
A. No.
Q. When was the last time you saw him?
A. July 23, 1946.
[fol. 152] Q. At that time he was not able to work, was he? He was not able to do any railroad work?
A. At that time?
Q. Yes.
A. No.
Q. Not able to do it now, is he?
A. Well, I don't know. He wasn't able to do the work he was doing at that time, because we had not finished with him the last time we saw him.
Q. You kept him until October? Sent him to Atlanta in October? Is that right?
A. No. He went there on September 2nd.
Q. Well, he was not able to work then, was he?
A. Not at that time.
Q. Did you put him in a plaster cast?
A. Yes, sir.
Q. Describe that cast to the jury.
A. It was a plaster cast. We engaged part of his body along the region from under his arms to between the knees, with his legs slightly spread.
Q. Spread apart?
A. Spread apart in this position, but not in this position. Slightly flexed in this position.
Q. That was a heavy cast?
A. Sir?
Q. That was a heavy cast?
A. We don't consider it abnormal.
Q. It kept him immob-le?
A. Sure.
Q. That was the intention of it?
A. Yes.
Q. For how long?
A. About four to six weeks he was in the cast.

Q. Well, when he got out of it, what sort of treatment—what treatment did you give?

[fol. 153] A. When he got out of the cast, why, then—let me refresh my recollection. After he was taken out of the cast in Panama City on June 25th, then I made another picture of his pelvis here in Dothan. That was the next thing.

Q. When was that made?

A. That was made on June 25th.

Q. Now, what was his condition at that time?

A. He told me he felt better and had less pain than before he went in the cast. Still had some pain, in the same region.

Q. Doctor, if that pain continued from that time up to the present time, and he suffered extreme nervousness, had to take sedatives to get sleep, he would not be able to work, would not be able to do the sort of work he had been doing?

A. I don't think he would have to do that.

Q. Certainly not the sort of work he had been doing?

A. I said I don't think he would have to take that much sedatives.

Q. Well, if he suffered the pain and had so much pain without sedatives, he still would not be so?

A. Well, if that's so.

Q. You have not seen him in several months?

A. No.

Q. To know. In other words, I am asking you if that condition was there, he would not be able to work? Assuming that's so, I am asking you, as a doctor, if he would be able to work? You stated he would not just now. Do you want to modify it?

A. No.

Q. If his condition has not already improved from that time up to this time, and he is still suffering from pain, I will ask you if you could state whether he could do the sort of work he could before?

A. Well, I don't know he was suffering that.

[fol. 154] Q. I am asking you, assuming he was suffering that way. I am asking you a hypothetical question as a doctor?

A. If I understand you right, the way I am to presume he was having that much pain, but I don't think he was.

Mr. Pettus: We move to exclude that and strike that.

Witness: If you are hurt, no.

Mr. Pitts: What's that?

Witness: If you are hurt, no.

Q. I will ask you this: If this condition—you say it's congenital—spondulix is the only word I know—this spondylolisthesis, I will ask you to state while it is congenital, is that a permanent condition?

A. Did you say prompt or permanent?

Q. Permanent.

A. No.

Q. Is there any remedy for it, except an operation?

A. I don't think I can answer that in that way. I can tell you this: Eighty-five percent of them will get well with an operation, and a good many get well without an operation.

Q. Well, the operation is where you have to cut in the back and have to operate on the spine. That's a serious operation, isn't it, Doctor?

A. Well, all operations are bad, but that operation is not considered a bad type of operation.

[fol. 155] Q. That's considered very moderate. I will ask you to state to the jury what is this spondyololisthesis?

A. He coughed, and I didn't get it.

Q. That spondylolisthesis, describe it. Is it some trouble with the joint, backbone, sacroiliac?

A. What we describe as non-fusion of the arch. That's the thing. Don't come together with a cleft arch; a disc.

Q. Is that not cleft to the bone, in the arch of the backbone?

A. No, isn't in the bone. There isn't any bone there. That's where you get the deformity. Never was any bone there.

Q. Well, it is a missing part of the bone, is it, Doctor? The bony structure is incomplete?

A. Yes, incomplete. It isn't there.

Q. Well, if it is not there, it is not a complete bone?

A. No, it is not a complete bone, if it is not there.

Q. All right. How much of it missing?

A. You mean in that particular case?

Q. Yes. I am talking about this case.

A. Just a small section.

Q. If there is an absence of the bone that ought to be there, the x-ray will show it, won't it?

A. Yes, sir.

Q. Does the x-ray show it?

A. Yes.

Q. This x-ray here?

Mr. Lee: He has already examined that.

Q. You examined this.

A. Yes, sir.

Q. All right. Point out in this x-ray here where there is a missing part of the arch.

A. I can't take this thing out.

[fol. 156] Mr. Lee: It is all right for you to take it out.

Witness: Have to do it, to show it to you. I won't disturb this a little bit.

Q. You say part of that bone is missing (referring to an x-ray picture)?

A. Yes, sir.

Q. The trouble there is with the bone and not with the cartilage? The trouble is the absence of the bone, and not the cartilage?

A. I don't know about the cartilage. There is no bone there.

Q. Well, is there any trouble with the cartilage? I will ask you that question. Is there or not?

A. With the cartilage, no.

Q. What do you call the disc?

A. The disc is what you call the pad there between the two.

Q. No trouble with that?

A. No.

Q. Only trouble is there a part of the bone is missing. Can a trauma cause this?

A. No.

Q. Can the condition be aggravated by trauma?

A. Yes, sir.

Q. I will ask you if the man Carter had been able to do all sorts of active work all of his life, doing train work, or other help, never had any trouble, or never knew he had any trouble, with his back, and was to get an injury and suffered pain, would you say that was caused by the injury?

A. No.

[fol. 157] Q. Or the condition was aggravated or brought on by the injury he received?

A. No.

Q. There was something that happened at the same time

he got his back smashed. The injury had nothing to do with it?

A. The injury didn't have anything to do with it. I think the thing just happened at that time.

Q. Just happened at the time that he fell. Now, I will ask you if it is not a fact you took some x-rays which show no bone deformity or structure there?

A. No.

Q. Did your x-ray first show it?

A. Yes.

Q. Didn't you send an x-ray to Dr. Fincher in Atlanta?

A. Yes.

Q. Didn't he report to you he didn't see anything of that sort?

A. No. What I sent to Dr. Fincher was to see——

Q. Did he report to you he couldn't see it, the x-rays you sent there?

A. I didn't send them to Dr. Fincher for that.

Q. You sent the x-ray here along?

A. Yes.

Q. He wasn't looking for it?

A. Doctor finds some have a rupture nucleus. Wasn't looking for spondyololisthesis or anything else.

Q. What did he say he was looking for?

A. Rupture nucleus.

Q. Just what I asked. That's a part of the vertebrae?

A. Yes.

Q. Did he find it?

A. No.

Q. But you didn't have any evidence of it, did you?

A. The rupture nucleus?

[fol. 158] Q. Yes.

A. No.

Q. Now, is there any treatment that can cure this condition, outside of an operation?

A. Some of them get well from rest in a cast.

Q. And if you have an operation the purpose of that operation is to supply a cap to the bone to complete it?

A. No.

Q. What is the purpose?

A. But a cap on the side, to hold that bone above and below; I mean, in this position. When this deformity is there, and the vertebrae slip, they slip forward and out of place.

Q. If they didn't slip, the vertebrae still in position, they would not be out of place?

A. He had it all the time, and then it slipped.

Q. The condition was there, and never caused any trouble all the time, and when this condition happened, then the trouble was there?

A. That's right.

Q. And it is irreparable unless he has an operation. That's right, is it not? How many operations of this kind have you performed in your many years of practice?

A. None.

Q. What?

A. None.

Q. None at all?

A. No, sir.

Q. How many have you been present to see?

A. I couldn't say that. I suppose as many as I find.

Q. How many did you see?

A. The last one I saw had slipped three or four times.

Q. I am not asking you that.

[fol. 159] Mr. Lee: We submit he is answering the question.

Q. How many operations of this kind have you seen?

A. I couldn't say.

Q. You have got no recollection on it?

A. I didn't make any note of it.

Q. Where did you get this 85%?

A. That figure I got from Dr. Albert Ferguson, from Brookline, Massachusetts. One was at the New York Medical Center before he went there. And he was writing the book right at that time.

Q. Don't you know, as a matter of fact, the army physicians were following this operation, they quit, could not do it, because it wasn't successful?

A. I don't think so.

Q. Isn't that true?

A. I couldn't answer the question. My conclusion, if they didn't finish a soldier in three months they would turn him out.

Q. You have no interest in this case, except you are chief physician?

A. No.

Mr. Pettus: That's all.

The Court then, at 5:15 P. M., recessed until 9:00 A. M. the following day.

Second Day

12-3-47

The Court: Are you ready to proceed, gentlemen?

STATEMENT RE TESTIMONY OF JESSE HOLMAN

Mr. Lee: If the Court please, at yesterday's session we had a defendant's witness subpoenaed, Mr. Jesse Holman, [fol. 160] the engineer of the defendant company, and last night he was taken sick and is not able to be here today. With counsel for the plaintiff we have reached an agreement as to the corresponding diagram, as it is drawn on the board, and this drawn to scale, which would have been identified by Mr. Holman, as to the board, that that is the point involved on the track and that the grade amounted to one percent, one percent downgrade. This is the diagram we would like to introduce; and on here, these are official numbers; they are official numbers of the company on these tracks which we would make shown, so they would correspond to the diagram which has already been testified about, and be no confusion on the part of the jury. The track—of course, the main line track as designated on here is the same main line, the same as the one on here. The track as designated on the diagram drawn on the blackboard as a pass track, that track appears on this diagram as No. 4 track; 4 and the pass track are the same. The track that appears on the diagram on the board as the No. 3 track, appears on the drawing as No. 5 track. So far as No. 5 I will just put those pencil—putting pencil notations to correspond there.

Mr. Pettus: Better put it on there.

Mr. Lee: Yes. In other words, the pass track is on that, and No. 3. And what is designated here as the lead track going out, appears on this as No. 3.

Mr. Jackson: You might also state that No. 3 and the pass come together.

[fol. 161] Mr. Lee: That's right. This map is not drawn so as to include this area down below here where No. 3 and the pass track come together. It involves this area from here up, and that portion of the diagram is true. This written diagram—I mean the diagram identified by Mr. Hol-

mon—is a diagram from this point up, drawn to scale, of this particular area right there and where the couplings were involved in this case. As I say, I designated on there, as you gentlemen can see, by No. 3, "Lead Track," and over here on No. 5, that's No. 3 there, and No. 4 is the pass track. And we offer that diagram in evidence as exhibit for the defendant.

Mr. Pettus: What exhibit number is that?

Mr. Lee: That would be No. 1, I believe.

The map is marked Defendant's Exhibit No. 1.

Mr. H. W. Richburg, a witness for the Defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Lee:

Q. Mr. Richburg, your initials are H. W., are they not?
A. Yes, sir.

The Court: Speak loud, so the jurors can hear you.
[fol. 162] Witness: Yes, sir.

Q. Are you employed by the L. & N. Railroad Company, and live at Pensacola, Florida?
A. Yes.
Q. What is your position with the L. & N. Railroad Company?
A. Foreman for the car department.
Q. Foreman for the car department. How long have you been so employed by the L. & N. Railroad Company, Mr. Richburg?
A. I have been employed with the L. & N. 21 years, five months, and this is the 18th day.
Q. Over five years. You are familiar with the L. & N. 2000 series, particularly L. & N. car No. 20042, the car that is involved in this litigation?
A. I am.
Q. I show you here what purports to be L. & N. car 20042, Mr. Richburg, and ask you whether or not that is a true and correct picture of L. & N. car No. 20042?
A. It is.

Mr. Lee: The Defendant offers in evidence the picture here identified by the witness, and also as further identified by the defendant, Neroy Carter, in this case, and ask that it be marked Exhibit No. 2 of the defendant.

Mr. Pettus: We object to it on the ground that it is not shown when the picture was taken, or whether it was in the same condition, or whether it had the same load it had at the time.

[fol. 163] Mr. Lee: Mr. Carter testified yesterday it was the same condition and in his opinion approximately the same kind of load.

The Court: Overruled.

Q. Would you say when the picture was made?

A. Yes, sir. June 29, 1947.

Q. Over a year later?

A. Yes. Well, would be about a year and four months later.

Q. Yes; and of course it is not loaded with the same load, same material?

A. No, it is not loaded with the same material. It is a load of the same type wood, pulpwood.

The Court: I don't see why it would be different, when it is the same car.

Witness: Yes, sir.

The Court: And you testified that is a picture of the car number, the exhibit is?

Witness: Yes, sir.

The picture is marked Defendant's Exhibit No. 2.

[fol. 164] Q. I show you here a picture of L. &. N. car No. 20039, and L. & N. car No. 20092. Are they the same cars and same series identically as type 20042?

A. They are.

Q. As car foreman for the L. & N. Railroad Company, do you have in your possession the records, and are you familiar with the records, of repairs made on L. & N. car No. 20042 from the date of February 2, 1946, down to and including March 10, 1947?

A. I do.

Q. Will you get those records, please, sir? On February the 2nd—I'll ask you this: On February 2, 1946, was L. &. N. car No. 20042 equipped with an automatic coupler?

A. Well, the first record I have in February, 25.

Q. What I mean, it was equipped with an automatic coupler?

A. It was.

Q. Now, after February 2nd, do you have all of the records from February 2nd down and through March 10, 1947, which show repairs made to L. & N. No. 20042?

A. I do.

Q. What is the first date of any repair made to that car after that time?

A. February 25.

Q. All right. What was the nature of the repair made at that time?

A. It was subjected by our inspector for a center rail.

Q. Center rail repair?

A. Yes, sir. That's the dividing strip that runs down the middle of the car on the front.

Q. Was it otherwise checked, to check the safety appliances on that date?

A. It was.

[fol. 165] Q. Were there any defects in that car on that date other than those noted to this center rail, which was repaired?

A. The inspector took no exception, and I found none.

Q. Found no defects. Is that an original sketch of that car today there?

A. Yes, sir.

Q. When was the next time that care was repaired?

The Court: Wasn't that subsequent to the date of the coupling?

Mr. Lee: Yes, sir.

The Court: What difference does it make?

Mr. Lee: I can ask him this way. I will withdraw that question.

Q. Mr. Richburg, from February 25th down to and including March 10, 1947, which is the last date you have testified about, were any repairs made to the automatic coupling device on L. &. N. car No. 20042?

A. No.

Q. During the interim period, how many times was it inspected?

Mr. Pettus: We object to that.

The Court: If he knows, I will let him testify.

Q. Just the number of times?

A. The only ones I have of actual inspection is the number that entered the shop.

[fol. 166] Q. That's what I mean. How many times was that? Give the number of them?

A. All right. I have February 25th and March 28th.

Q. Those were in 1946?

A. That's right. And I have 7/1/46.

Q. That's July 1st, 1946?

A. July 1st. I have July 23rd.

Q. '46?

A. 1946. I have November 1st.

Q. '46?

A. 1946. I have December 20, 1946, and I have March 10, 1947.

Q. On any of those occasions, Mr. Richburg, during which that car was examined, was there any defect existing in the automatic coupler on L. & N. car No. 20042?

Mr. Pettus: We object to that. He couldn't know what all of the inspectors found.

The Court: Yes. That question should be changed: If you, in your inspection, found any defect?

Witness: I did not.

Mr. Lee: Take him.

Cross Examination.

By Mr. Pettus:

Q. That car went to other places than Dothan, didn't it?

A. I have no record of where the car went.

[fol. 167] Q. Where is your office?

A. Pensacola.

Q. You don't have any record, but you know, as a matter of common knowledge, that it went to other points and other places in the course of its business? In other words, that car's travel was not limited to Pensacola, Dothan and Panama City?

A. The car was ordered to be loaded wherever the parties that orders the cars. That's where it goes to be loaded.

Q. That car goes to many places and is attached to many railroads, is it not? That L. &. N. car goes where it is ordered?

A. Well, it is assigned to what we know as the Pensacola Division, and it doesn't leave too far from this division. However, it does interchange with other railroads.

Q. That's the point; and during these intervals it could have been in the hands of all the railroads?

A. Who?

Q. Could have been in other shops, for inspection or repair by other railroads?

A. Yes.

Q. If there had been any repairs or inspection by other railroads, would you have a record of that, what had been done in some other shop?

A. I have no record, except the Pensacola Division.

Q. If the repair had been in another L. & N. Shop—you have got a record of the Pensacola shop?

A. Yes, sir.

Q. If it had been in any other L. & N. shop, would you have a record of that, if repaired?

A. No.

Q. You don't know what happened in any other L. & N. car on the date of inspection?

A. I have the date of inspection in the car at Pensacola.

[fol. 168] Q. That's all you have?

A. That's all I have.

Re-direct examination.

By Mr. Lee:

Q. You say that car is assigned to the Pensacola Division?

A. It is assigned to the Pensacola Division.

The Court: Come down.

Mr. Lee: With the permission of the Court, we would like to excuse Mr. Richburg.

Mr. Pitts: Just a minute.

The Court: Gentlemen, let's get along with this case. He has testified about the movement of the car.

Mr. Lee: You are excused, Mr. Richburg.

Mr. D. M. James, a witness for the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. What are your initials, Mr. James?

A. D. M.

[fol. 169] Q. Mr. James, were you the fireman on the switching operation on the night of February 2, 1946, in which it is said Mr. Neroy Carter was injured?

A. Yes, sir.

Q. Mr. Grant, I believe, was engineer of that train?

A. Yes, sir.

Q. Mr. James, after you came back out on the main line from picking up cars on the inside storage track, did that engine, and the cars attached thereto, proceed down that main line towards any point? I'm getting down. Eliminating this other operation, down to this first car, to this L. & N. car No. 20042, after you set it on the main line?

A. We coupled it, and then shoved on toward the No. 1 woodyard.

Q. You say you shoved on toward the No. 1 woodyard?

A. Yes, sir.

Q. When you say you coupled, you mean on the main line?

A. Yes, sir.

Q. Where were you on the engine?

A. I was over on the left-hand side, which is the fireman's side.

Q. Which is the fireman's side. That's what you call the off-side, is it not?

A. Yes, sir.

Q. Now, Mr. Morrison, the footboard man, and Mr. Carter, and the engineer of those cars, were on the opposite side of the train from you?

A. Yes, sir.

Q. After you say you coupled out on the main line, do you know whether or not any signal was given or acknowledged after that point—at that point?

A. All I could see was the engineer answered some kind of a signal by two short blasts of the whistle.

[fol. 170] Q. What kind of answer?

A. Two short blasts of the whistle.

Q. What does that mean?

A. Answer to a signal not otherwise provided for.

Q. That is in answer to a signal given?

A. Yes, sir.

Q. Then what did the train do?

A. Immediately moved ahead.

Q. Moved ahead. Of your own eyes, at this point did you know whether or not that coupling had been made or missed?

A. I did not know, either way.

Q. You did not know, either way. Where did that train proceed to?

A. Down on the main line, off on the lead, and into No. 1 woodyard.

Q. Into No. 1 woodyard?

A. Yes, sir.

Q. After it proceeded, was it brought to a stop?

A. Yes, sir.

Q. All right. Standing down—well, I will first ask you this question: At the time when you say the coupling was attempted there, up on the main line, what was the speed of the train, in your judgment, at that time, before Engineer Grant acknowledged the signal you testified about?

A. Well, it was pretty near nothing. I couldn't say definitely.

Q. Just barely moving?

A. Yes, sir.

Q. After the acknowledgment of this signal, did the speed of the train increase?

A. Yes, sir.

Q. What was the maximum speed it attained, in your judgment and opinion, before it was brought to a stop?

A. Four to six miles per hour.

[fol. 171] Q. Four to six miles per hour?

A. Yes, sir.

Q. From the time that it proceeded, down to the time that it stopped, Mr. James, did you notice any bump or jolt or jar in the operation of that train?

A. No.

Q. I'll ask you if that train in that operation, increased to ten cars, or nine cars, traveling at a speed of ten to twelve miles, had made a coupling, would you have felt it in that engine?

Mr. Pettus: We object. Not a proper predicate laid.

The Court: Have you any judgment about it? If the train was going eight or ten miles per hour, and made the coupling, when you hit the car?

Witness: Yes, sir. I feel sure that it would have jarred the train, no more cars than we had on that time.

Mr. Lee: Take him.

Cross examination.

By Mr. Pettus:

Q. This signal you are talking about, when you went down to make the coupling, to pick up the L. & N. car, you didn't know what car that was?

A. No, sir.

Q. Didn't know it was an L. & N. car, or what the number was?

A. No.

[fol. 172] Q. All you know, you were going around to pick up a car. Now, at that time the train was barely moving?

A. Yes, sir.

Q. Made that first coupling to pick up that car?

A. Yes, sir.

Q. You didn't feel any jar with that, did you?

A. No.

Q. You couldn't tell whether the coupling was made or not?

A. No.

Q. But you heard the engineer give a whistle acknowledgement of some signal. You didn't know what signal it was?

A. No.

Q. You heard him signal?

A. Yes.

Q. Then the train pulled back out, and what line was it on then?

A. We were on the main line, where we coupled one car, and proceeded down the main line.

Q. Proceeded down the main line toward the woodyard?

A. Yes, sir.

Q. Did you ever hear any other signal after that first signal when he picked up speed and started down the main line, after he got this car?

A. No.

Q. Did you ever hear any other acknowledgment of any signal?

A. No.

Q. When the train got down near the woodyard to the point where it stopped, did you—could you tell whether the air brakes were applied, or was it a service stop that was made?

A. It was an application of the automatic air brake.

[fol. 173] Q. Automatic air brake, but it was not an emergency?

A. No, it was not an emergency.

Q. And how far did that train run after the brakes were applied?

A. Just a short distance.

Q. Well, as many as three or four car lengths?

A. No. I don't think it would have been over forty or fifty feet.

Q. Forty or fifty feet; and going at the rate of speed it was traveling then, with the load it had then, if the brakes had been applied in emergency it could have stopped in eight or ten feet, couldn't it?

A. It is doubtful. I couldn't say positively just how long it would have taken to——

Q. (Interposing): Anyway, it could have stopped in fifteen feet in emergency, couldn't it?

A. It's a little downhill. Pick up considerable speed down there, if the brakes are not applied in the proper time. He had already used one application.

Q. He had reduced it in making one application?

A. No.

Q. Did it reduce the speed any?

A. Yes, sir. It was going a very low rate of speed.

Q. If it was going at a very low rate of speed, then the emergency would have stopped it in eight or ten feet, wouldn't it?

A. I couldn't say.

Q. Do you have any judgment about that? The emergency would have stopped it quicker than the ordinary

application? The emergency would make a quicker stop than an ordinary application, what you call a service stop?

A. Well, depends on the grade.

Q. Well, it would depend on the grade if you were making a service stop. I am talking about the same service, same train, same load and the same track. With the [fol. 174] service brakes, it would go farther than if you gave the emergency?

A. The brakes vary in some ways. I couldn't answer that. I am not an expert.

Q. You would not need any emergency if you could stop as quick without it?

A. No.

Q. Do you know what speed this train was going at the time these brakes were applied?

A. I do not, sir.

Q. Are you familiar with the rule on the definition of speed for the yard?

A. Yes, sir.

Q. I will read this, on page 13 of your Rule Book, which has been identified: "Restricted speed". "Restricted speed", with the "Yard speed", and ask you if this is right: "Proceed prepared to stop short of train, obstruction, or anything that may require the speed of a train to be reduced." That was a valid rule at that time, wasn't it?

A. Yes, sir.

Q. And as to "Yard speed", is this a valid rule in existence at that time: "Proceed prepared to stop within half the range of vision." Is that the yard rule in effect at that time?

A. Yes, sir.

Mr. Lee: What page is that on?

Mr. Pettus: Page 13.

Q. That was one of the defendant company's, the Bayline, rules?

A. Yes, sir.

[fol. 175] Q. Well, that was the rule?

A. Yes, sir.

The Court: Through with this witness?

Mr. Pettus: Just one second, your Honor. That's all.
The Court: Come down.

Witness excused.

Mr. T. L. Nichols, a witness for the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Nichols, are you employed by the defendant, the Atlanta and Saint Andrews Bay Railway Company?
A. Yes, sir.
Q. In what capacity?
A. General superintendent.
Q. General superintendent. How long have you been employed by the defendant in that capacity, Mr. Nichols?
A. Little over three years.
Q. Over three years. And how long have you been engaged in railroad work?
A. Approximately thirty years.
Q. Approximately thirty years. During that time have you had experience as a brakeman and a trainman?
A. Yes.
[fol. 176] In the operation of freight trains?
A. Yes, sir.
Q. And your experience as a railroad man has been continuous from that date—I mean, for the last thirty years, down to date?
A. Yes, sir.
Q. Mr. Nichols, are you familiar—the book, did you-all offer it in evidence?

Mr. Pettus: We didn't offer it.
Mr. Jackson: Just read.
Mr. Lee: Offered the rule?
Mr. Jackson: Yes.

Q. You are familiar with the rules of the Transportation Department of the Atlanta and Saint Andrews Bay Railway Company, are you not?
A. I am.

Q. Were those rules in force and effect on February 2, 1946?

A. Yes.

Q. Prior to that date had Neroy Carter, the plaintiff in this case, been furnished with a copy of them?

A. Yes, sir.

Q. And a written receipt taken therefor?

A. Yes.

Q. I show here what purports to be Time Table No. 70, and particularly Paragraph 17 thereof. Was this time table in effect on February 2, 1946?

[fol. 177] A. Yes.

Q. The date of the alleged incident in this cause; and Paragraph 17 was likewise in force and effect on that date?

A. That is right.

Q. Mr. Nichols, according to common railroad practice and safety precautions, what is the recognized procedure when a coupling is missed, or there is a parting of the train, that is, with reference to the moving parts, the detached parts?

A. It should be brought to a stop before a coupling is attempted.

Q. It should be brought to a stop. That's the detached part of the train should be brought to a stop before a coupling is attempted?

A. That is correct.

Q. I will ask you, as a matter of common railroad practice and procedure, is it a practice to stop immediately when signals are lost from view temporarily?

Mr. Pettus: We object to that. That attempts to vary the rule.

A. He is charged with——

The Court: Overruled.

Mr. Pettus: We object on the grounds that it is incompetent, irrelevant, illegal and immaterial; common railroad practice is not involved; governed by the rule. Can't suspend the rule any more than the law.

The Court: Overruled.

[fol. 178] Mr. Pettus: We except.

A. No, sir, not when it is lost.

Q. Mr. Nichols, take this rule book there, please, sir. Turn to Rules 101, 102, 12 (e) and 14 (f). Are you familiar with those rules?

A. Yes, sir.

Q. And those were in force and effect at that time?

A. Yes, sir.

Q. Do you know from your own knowledge, or from any source, whether or not at that time Mr. Carter, the plaintiff in this case, was familiar with those rules?

Mr. Pettus: We object.

Mr. Lee: If he knows.

The Court: If it is his own knowledge whether he knew.

Mr. Pettus: Object on the ground it calls for an undisclosed mental operation.

The Court: Overruled.

A. He filled an application blank on this book in answer to the question on rule 102.

Q. On written examination?

A. On written examination.

[fol. 179] Mr. Pettus: We move to exclude the answer on the ground that it is not responsive, and based on secondary evidence.

The Court: If that's all he has, I will sustain the objection. If he can identify it, I will let him answer.

Q. Was Carter given a written examination with reference to Rule 102, and did he make written answer to that rule?

A. He was.

Q. Do you have that answer there?

A. I do.

Q. In his handwriting; and appearing on page 22 of that (the examination book) No. 102, is that the answer Mr. Carter made to the Rule which was prior to this accident involved in this case?

A. Yes, sir.

Mr. Lee: We offer that in evidence, if the Court please, the answer of Mr. Carter, the plaintiff in this case, Rule 102, prior to February 2, 1946, and ask that it be marked the proper exhibit.

The matter referred to is on page 22 of the examination book, and is marked Defendant's Exhibit No. 3

Mr. Pettus: That's just the Rule 102?

Mr. Lee: Just the Rule 102.

[fol. 180] Mr. Pettus: We have no objection to it.

The Court: Seems to me like it should be read to the jury.

Mr. Lee: That's what we propose to do, as a time-saver.

Mr. Pettus: That's what we propose to do at the proper time.

The Court: All right.

Q. Are you familiar with the manner of coupling a car of the type involved in this series, such as car 20042, involved in this case?

A. I am.

Q. I will ask you if in common railroad practice and procedure, a man attempting to make a coupling, is it best to open one knuckle or both knuckles?

A. One.

Mr. Pettus: We object to that on the ground incompetent, irrelevant, illegal and immaterial, proper predicate not laid, calls for the opinion of the witness, and does not hypothesize the correct rule.

The Court: You are familiar with the mechanism of these automatic couplers?

Witness: Yes, sir.

[fol. 181] The Court: And you testify, as I understand it, they are more likely to make, with one open, than two?

Mr. Pettus: Your Honor please, our objection is on common practice.

Witness: Yes, sir.

The Court: Two would diminish the likelihood of making a proper coupling?

Witness: Yes, sir. Two pins would have to fall, instead of one.

Mr. Lee: If the Court please, I would like to offer Time Table No. 70, that's Paragraph 17, of the Time Table No. 70, as identified by the witness, and we will make presentation of it with the argument.

Mr. Pettus: We object to its introduction; incompetent, irrelevant, illegal, immaterial.

The Court: Overruled.

Mr. Pettus: We except.

Paragraph 17 of the Time Table is marked Defendant's Exhibit 4.

[fol. 182] Cross-examination.

By Mr. Pettus:

Q. Now, Mr. Nichols, this is your signature, is it not?
A. Yes.
Q. Sworn to and subscribed to before me this 10th day of April, 1947?
A. Yes.
Q. Alto V. Lee, a notary public?
A. Yes.
Q. This sets out the full affidavit, and so forth, familiar with the matters contained. This question No. 45 was propounded to you. Look at paragraph 45. "45. At what rate of speed was the train moving at the time it made contact with L. & N. car number 20042, after the coupling had failed and when plaintiff was hurt", and in answer to that 45, you said "From 2 to 3 miles per hour at decreasing speed." Was that correct? That answer you made?
A. That's correct.

Mr. Pettus: You can stand aside.

Redirect examination.

By Mr. Lee:

Q. From what source did you receive that information?

Mr. Pettus: We object to that.
The Court: Let's don't ask the witness so much questions.
[fol. 183] Mr. Pettus: We are cutting time down strong, your Honor.

Witness excused.

Mr. Davis, a witness for the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Davis, you are employed by the defendant in this case as chief clerk to the clerk and general manager?
A. Yes, sir.

Q. You have before you records, way-bill, of L. & N. car No. 20042 of February 2, 1946? The records of the company, proper records of the company?

A. Yes, I have that record. It is dated February 4th.

Q. That's what I say.

A. Yes, sir.

Q. That record before you notes what the car was loaded with on February 2, 1946?

A. It does.

Q. What was that?

A. 17.04 cords of pulpwood.

Q. Seventeen and four one-hundredths cords of pulpwood.

A. Seventeen and four one-hundredths.

Q. You have this record for L. & N. car No. 20042, I believe, on June 29, 1947?

A. I haven't the original record. Photostat copy.

Q. Where is that?

A. I think you will find it in my case. . . . I have a photostatic copy of that.

Q. Is that a true and correct copy?

A. It is a true and correct copy.

[fol. 184] Q. It was also loaded with pulpwood at that time, wasn't it?

A. Yes, sir.

Q. How many cords did it have on it then?

A. 17.52.

Q. 17.52. That's all.

Cross-examination.

By Mr. Pettus:

Q. Now, how much—you referred to this as cords?

A. Cords.

Q. Don't the wood people call it units?

A. I am not familiar with that point.

Q. What was the weight of this wood?

A. I can't answer that.

Q. Don't know the weight of this load?

A. No.

Q. As much as sixty tons?

A. I don't know.

Q. You don't know what a cord would weigh?

A. No.

Q. This picture that was made in June had a fraction more in cords than the other car? One was four-hundredths and this was fifty-two hundredths?

A. Yes, sir.

Q. Nearly half a cord more on the June picture. Do you know whether it was the same sort of wood——

The Court: Mr. Pettus, looks like we are getting very far from the issue here. There is no evidence that it was overloaded.

Mr. Pettus: No, but it was shifting, and evidence of the weight of a cord——

[fol. 185] The Court: Might have shipped it only half loaded.

Mr. Pettus: That's true, but as to the weight of the car——

The Court: I am interested in getting along with this trial.

Mr. Pettus: As much as we are. We are taking very little time crossing some witnesses.

The Court: Great deal of time, on both sides of the trial, that's not an issue.

Mr. Pettus: Your Honor, we are going as fast as we can.

Q. In other words, you don't know what the weight is?

A. No.

Q. And that's all you know about it, these two pictures. Were you present when both pictures were made?

A. No.

Q. Were not even there when they were taken?

A. No, was not.

Q. You know whether this L. & N. 20042 was a bad order car?

A. I do not know. I would not have a record.

Q. Did you hear a report about it being a bad order car?

A. I did not.

[fol. 186] Q. Did you hear anything said about the time or before this accident that this was a bad order car, by any of the railroad men?

A. No.

Mr. Lee: Defendant offers in evidence Rule 102, the signals prescribed, Rule 12(e) and 14(f). Defendant rests.

Rule 102 is on page 51 of Defendant's Rule Book, and is marked Defendant's Exhibit 5. Rule 12(e) is on page 21 of Defendant's Rule Book, and is marked Defendant's Exhibit 6; Rule 14(f) is on page 23 of Defendant's Rule Book, and is marked Defendant's Exhibit 7.

Mr. Pettus: Your Honor, we have about one question to ask in rebuttal of Mr. Carter.

The Court: All right. Call the witness.

Plaintiff's Rebuttal

Mr. Neroy Carter, the Plaintiff, being recalled, testified as follows:

Direct examination.

By Mr. Pettus:

Q. Mr. Carter, yesterday at the time the attempted coupling was made reference to, you were asked on cross examination whether or not the engineer made an acknowledgment, as he should have done, of the come ahead. I will ask you, did you hear any whistle acknowledgment?

A. No.

[fol. 187] Q. Did you when you gave the slow come ahead signal, or the come on signal, hear any whistle?

A. No.

Witness excused.

Mr. Pettus: We rest.

Motion for Directed Verdict

Mr. Lee: If your Honor please, at this time, with reference to the charge in the complaint by which the defendant is charged with the violation of the Safety Appliance Act in regard to the automatic couplers, we would like to move the Court for a directed verdict in favor of the Defendant on that point. It is based upon this proposition: That the evidence, both for the Plaintiff and the Defendant, discloses that this car was equipped with an automatic coupling, as required by the Safety Appliance Act; that the only evidence, both for the Plaintiff and the defendant in this case, is to the effect that it failed to work at the

time there on the main line, on the main line when they came together; that it worked previously and worked subsequently, and the proof shows no defect in it; and under the finding in Western & Atlantic Railroad Company vs. Gentile, 198 S. E. 257, that this rule of law is laid down as to the construction of the Federal Safety Appliance Act with reference to automatic couplers: that the failure of couplers to couple automatically by impact is not per se a violation of this Act, and that's all the evidence discloses in this case, and a further rule that when there is a compliance with the equipping, then in that same case that they have applied this rule, unless there is some defect which occurs there. With respect to that particular proposition, we ask for the directed verdict.

[fol. 188] The Court: You gentlemen want to be heard?

Mr. Pettus: No. Let the Court pass on it.

Mr. Lee: Let your Honor pass on it.

The Court: I think I will give him a directed verdict on that phase of the case. I will so instruct the jury.

The following transpired in argument by Mr. Jackson to the jury:

Mr. Jackson: First, I would like to call your attention to the answers of Mr. Davis in the interrogatories.

The Court: I don't think that's exactly fair argument to the jury, because I sustained the objection, and Mr. Lee wanted to go in that, and I would not let him.

Mr. Lee: We would like to note further those interrogatories, with the exception of the exhibit showing earnings, were never offered in this case.

Mr. Jackson: Your Honor, may I make the observation that the only person, the trainman—engineer——

[fol. 189] The Court: That's all testimony in this case they have testified from information received, and for all I know the interrogatories disclose that; but I cut Mr. Lee off, and that's not in there, so far as the evidence is concerned.

Mr. Jackson: All right. We except.

Court's Oral Charge to the Jury

Gentlemen of the jury, the Plaintiff, Neroy Carter, brings this suit against his former employer, the Atlanta and Saint Andrews Bay Railway Company, under what is

known as the Employers Liability Act, an Act that was enacted by Congress for the benefit and protection of employees of railroad companies; and in the enactment of that law, gentlemen of the jury, I will call to your attention now that the Congress of the United States did not undertake to set up a law that would make the employer the insurer of its employees against all injuries that they might suffer during their employment. That's not the scope of this Act at all. The scope of the Act is that if an employee, in the performance of his duties of his employer by reason of the negligence of some of the employees of the employer, or by reason of the unsafe places or a defect in the instrumentalities he worked with, suffered injury, then the employer would become liable. And it is a rule of law, as I understand the law, and I think it is the law and I so charge you, that if the injury sustained by the employee was caused proximately, that is, as the direct cause, by his own negligence, then there should be no recovery; but under this Act, gentlemen of [fol. 190] the jury,—and I am trying to give you this in simple, understandable language—under this Act if the employee is negligent, and the other fellow employees are also negligent, it would not defeat his right of recovery, the fact that he was negligent, unless his negligence was the proximate cause of the injury. That is, in plain language, gentlemen of the jury, the law I think that is applicable to this case.

Now, we have spent considerable time in the trial of this case, and I am not saying this in any manner of criticizing the very able and skilled lawyers who have handled the case on both sides. As I view this case, we have taken up considerable time developing considerable detail that has practically nothing to do with the duty you are to perform now, since all the evidence is in and you have heard the arguments of counsel. Of course, in the operation of a railroad system they have a right, and they have these sidings and spur tracks where they can transact their business, and they could not make up a train and operate without engaging in all this preliminary you heard so much about on the night of this transaction. But when you get to the testimony in this case, it comes right down to the proposition of whether there was any defect in any of the mechanisms or the instrumentalities this employee was working with that brought about his injury; and I charge

you now, gentlemen of the jury, that there is no evidence in this case from which you could make such a finding. There is no evidence from which you could properly find there was defect in this automatic brake—I mean, hand brake, or this automatic coupling system on that car, and it would be improper for you to find for the Plaintiff on an issue of that kind.

Then that narrows the issue down to whether the Plaintiff's own negligence was the proximate cause of his injury, or whether, if he was guilty of some degree of negligence, his injury was also brought about by the negligence [fol. 191] of other fellow employees in and about the operation of that train.

I can see that probably a case of this kind very largely depends on whether you believe from this evidence the engineer, in backing his string of cars—I think some eight or ten of them—backing down to make that coupling, did so in a negligent manner, or at a negligent rate of speed. And the evidence on that phase of this case is very much in conflict, gentlemen of the jury. The Plaintiff, who testifies as a witness in his own behalf, testifies that as it came down there it was going about, I think he said, in his judgment, between ten and fifteen miles an hour, as I recall his testimony. The engineer and fireman, and, I think, another brakeman, all testified to a much lower rate of speed.

And in considering the Plaintiff's testimony, gentlemen of the jury, you consider it, and it is your duty to consider it, in the light of the fact that he is an interested witness. He doesn't come before you as a disinterested witness in this case. He is interested in the outcome of this trial and in the outcome of the verdict you may render.

If there was no other negligence in this case by any other employee than the Plaintiff, then your verdict would necessarily be for the Defendant. If the Plaintiff himself, who, under all of the testimony, negligently set the hand brake on the car, and that that was the proximate result of his injury, then his right of recovery would be cut off; or if in setting that automatic coupling device he set it in a negligent manner, and that was the direct and proximate cause of his injury, his right of recovery would be cut off. But if he was negligent in either one or both of those particulars, gentlemen of the jury, and notwithstanding that negligence, the engineer shoved a car down there at such a high

rate of speed as to proximately bring about his injury, then his right of recovery would not be cut off, but if he was negli-
[fol. 192] gent in the matters I have pointed out to you, in either one or both of them, you would consider that in diminution of any right of recovery that he has in this case. It would go to your sound discretion as to how much that should diminish the amount of your verdict for the Plaintiff, if you should find his injury was brought about, proximately, by the negligence of some of his fellow servants.

Now, gentlemen of the jury, I might talk to you a long time about this case, but that's the simple, plain rules of law that should determine you in this issue.

I hardly think it is necessary to call to the attention of a jury of intelligent men, as I am sure you gentlemen are, that you do not try a case like this on any feeling of sympathy toward the injured man, or what may be his present condition, what it was prior to that time, or what it may be in future life. All of that does come in play as to what the extent of the injury was, and what effect it will have on his future life, if you find he is entitled to recover; but if you do not find that he is entitled to recover, you have no action on a feeling of simply, feeling sorry for the man, and write a verdict because he is an employee of a railroad corporation. He must first bring himself within the rules of law to entitle him to recover, before you can consider the damages at all. If you believe the Plaintiff in this case has brought himself within the rules of law I have laid down to you, then you consider the testimony about the nature and extent of his injury, and you consider the testimony of the doctor at Birmingham, whose deposition was read in your hearing; consider the testimony of Dr. Ellis, who testified in your presence, and whether he had a congenital deformity or abnormality in that vertebra before this happened. That's all with you, gentlemen of the jury. If he had it, and this immediately caused it to come into activity at that time, that would all still be
[fol. 193] with you, as to what would be the measure of damages he would be entitled to recover by reason of that injury he alleges he suffered on account of the accident that occurred there on that occasion. But if you should find his own negligence was the proximate cause of whatever injury followed, then it would make no difference about the extent or nature of the injury. Your verdict would have to be for the defendant.

If you find for the Plaintiff, and find he was not negligent in any manner, and that his injury was entirely the proximate result of the negligence of the engineer or some of the other employees at that time, then you would award such measure of damages as in your judgment would reasonably compensate him for the injury that he has suffered. All the damages you award in this case are not punitive, but are in the nature of compensatory damages. It does not mean, gentlemen of the jury, that you could properly pay a man for all the pain and suffering that he might incur. There is not much rule of law by which you can measure damages in things of this kind; but for his loss of time, earning capacity, and things of that kind, all would be proper matter for you to consider in awarding damages, if you find he is entitled to any damages and that his own negligence in no manner contributed to his injury. If you find there was negligence on his part, and negligence on the part of other employees, then the jury gets down to the matter of weighing one thing against the other, and doing what you think is right in the way of damages, according to the evidence and rules of law I have given you.

It is in evidence, gentlemen of the jury, at the time this injury occurred, whatever injury it was, that the conductor was in what they call the shanty, he says engaged in part of his duties, writing up reports; and I know of no rule that would make it mandatory that the conductor be out actively [fol. 194] on the scene of the operation of the train all the time. I know no rule that would preclude him from doing that. And it is in further evidence that he had given Plaintiff in this suit instructions about the moving of those cars and the placing of them, and that, the Plaintiff was at the time this injury occurred in fact acting in carrying out the instructions of the conductor, and that he was directing the movements of the cars. But that would not preclude him from recovering, gentlemen of the jury, if, in violation of his instructions or violation of the rules for the proper movements of cars of railroad trains, some other employee negligently moved it in a way that brought about his injury.

That's this case, gentlemen of the jury; and if you find for the plaintiff your finding would be "We, the jury"—please give attention to the form of your verdict—"We, the jury, find the issues in favor of the Plaintiff, and we assess his damages at"—whatever amount you find proper,

of course not exceeding the amount claimed in the complaint. But that is no criterion or guide as to what shall be your finding, except, of course, you couldn't go beyond that.

If you find for the Defendant, the form of your finding would be: "We, the jury, find the issues in favor of the Defendant." And, of course, there is no matter of the amount, of assessing damages, if you find for the Defendant.

I will give you a charge or two that's been requested by the Plaintiff, gentlemen of the jury, that I think states proper rules of law for your guidance:

"I charge you, as part of the law of this case, that the fact, if it be a fact, that the Plaintiff may have been guilty of contributory negligence shall not bar his recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to the defendant." [fol. 195] You gentlemen are not lawyers, and I'm going to call your attention to that charge. It might be a little misleading, under some other instructions of the Court. This is a correct rule of law if there was negligence on both sides, but would not come into play if you should find his injury was directly or proximately caused by his own negligence.

"If you are reasonably satisfied from all the evidence in this case that the Plaintiff is entitled to recover and is himself free from negligence proximately contributing to his injury, then he is entitled to recover compensation, so far as it is susceptible of estimate in money, for the loss and damage caused to him by the negligence of the defendant, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he otherwise would have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant."

Gentlemen, I see that charge says he would be entitled to any expense for medical attendance. I don't recall there is any evidence that the Plaintiff had been to any expense.

Mr. Pettus: No. We will not insist on that.

The Court: How is that?

Mr. Pettus: We will not insist on that. We don't insist on that portion.

The Court: There is no claim for any medical attendance. [fol. 196] Mr. Pettus: Your Honor said if the plaintiff negligently caused his own injury, he could not recover. If the plaintiff by his negligence proximately caused his injury, he couldn't recover. Your Honor omitted "sole". In other words, if the plaintiff's negligence were the sole proximate cause, of course he couldn't recover.

The Court: I will modify it to that extent. That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, it would not make any difference as to negligence on the other side.

Exception to Portion of Charge

Mr. Pettus: We except to that latter part of your Honor's charge, "would not make any difference on the other side." We except to your Honor's charge that there was no defect in the hand brake, and also that portion of your Honor's charge that the plaintiff negligently set the hand brake, automatic coupling, and that was the proximate cause, without limiting it and saying it was the sole cause. In other words, was the proximate cause and not the sole cause. And then when your Honor was reading a written charge you said, in explanation, "if the direct or proximate cause of plaintiff's own negligence," and we except to that on the ground you did not say it must be the sole cause. We asked you an explanatory charge on that rule, if your Honor will give it at this time. I think your Honor overlooked charging it. If you will look at the rule.

The Court: I think I will refuse this charge.

Mr. Pettus: Refuse it?

[fol. 197] The Court: Yes. Give you an exception.

The Court: All right.

Mr. Pettus: Retire, gentlemen, and consider your verdict.

Plaintiff's Given Charges

2. If you are reasonably satisfied from all the evidence in this case that the plaintiff is entitled to recover and is himself free from negligence proximately contributing to his injury, then he is entitled to recover compensation, so far as it is susceptible of estimate in money, for the loss and damage caused to him by the negligence of the defendant, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering,

but also a fair recompense for the loss of what he otherwise would have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant.

Given,

C. B. Kennamer, Judge.

3. I charge you as a part of the law of this case that the fact, if it be a fact that the plaintiff may have been guilty of contributory negligence shall not bar his recovery but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff.

Given,

C. B. Kennamer, Judge.

[fol. 198] PLAINTIFF'S REFUSED CHARGES

1. If you find a verdict for the plaintiff and further find that he was not guilty of contributory negligence, and if you are reasonably satisfied from the evidence that his earning capacity has been impaired permanently, then the measure of his damages for loss, during the remainder of his life, by reason of such impairment of his earning power, is such sum as, put out at 6% interest per annum, would, by taking part of the principal and all of the interest each year equal the total of loss from impairment of earning capacity and would be exhausted at the end of his life expectancy. What is his life expectancy you will determine from all the evidence before you and relevant thereto including the mortality table, the condition of plaintiff's health, his habits, his occupation, and any other evidence that may reasonably seem to bear on this question of life expectancy. Having fixed the life expectancy, you take what you find from the evidence will be the amount of annual loss and multiply this annual loss by the number of years in what you find to be his life expectancy. The result will be the total amount of future loss by reason of impairment of earning power. But the plaintiff is not entitled to be paid in a lump now in advance this total amount. What he is entitled to in this particularly, if you find a verdict for him, is what stated at the outset of this charge—a sum that taking a part of the principal and all of the interest each year, will equal the total loss from

impairment and will be completely consumed at the end of the period of life expectancy. Such sum is styled the 'present value' or 'present worth' of the larger sum so capitalized into a present lump payment. In ascertaining what is the present value of the total of future lost earnings you may use the evidence from the annuity table and the present value of one hundred dollars a month for the [fol. 199] life expectancy at six percent. To apply this to the case before you, take from the evidence the present value of $100.00 per month for what you find the life expectancy to be, then multiply that sum by the number of hundreds in the monthly loss of future earnings, and you have the present value of the plaintiff's lost future earnings.

Refused,

C. B. Kennamer, Judge.

X. If you are reasonably satisfied from the evidence that while engaged in a switching operation in defendant's railroad yard in the night time the enginemen lost sight of the signal lights of the train crew, it became and was the duty of the engineer to bring his engine and train to a stop as soon as reasonably possible.

Refused,

C. B. Kennamer, Judge.

4. If you believe the evidence you cannot find the Plaintiff was guilty of negligence proximately contributing to his injury.

Refused,

C. B. Kennamer, Judge.

VERDICT

We the Jury, find the issues in this case in favor of the defendant.

J. A. Peterson, Foreman.

Dec. 3, 1947.

[fol. 200] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed December 10, 1947

Now comes Neroy Carter, plaintiff in the above entitled cause, and moves this Court for an order setting aside the verdict and judgment herein and granting a new trial of the above entitled cause for the following reasons, viz.:

1. For that the verdict is contrary to the great weight of the evidence.

2. For that the verdict is contrary to the great preponderance of the evidence.

3. For that the judgment is contrary to the great weight of the evidence.

4. For that the judgment is contrary to the great preponderance of the evidence.

5. For that the Court erred in ruling on questions of evidence and the admissibility thereof during the trial of this cause.

6. For that the Court erred in sustaining the objection of the defendant to the following question of plaintiff propounded to the witness Kirkpatrick: "Now, Mr. Kirkpatrick, at the interest rate of 5%, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy of a man 32.91 years?"

7. For that the Court erred in sustaining the objection of the defendant to the following question of plaintiff pro-
[fol. 201] pounded to the witness Kirkpatrick: "Now, Doctor, I will ask you the same question at the interest rate of five and one-half per cent."

8. For that the Court erred in sustaining the objection of the defendant to the following question of the plaintiff to the witness Kirkpatrick: "Mr. Kirkpatrick, at the interest rate of six per cent, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy, the life expectancy of 32.91 years?"

9. For that the Court erred in sustaining the objection of the defendant to the following question propounded by the plaintiff to the witness Kirkpatrick: "Are you familiar with the income earned by the money of this company (meaning the Protective Life Insurance Company of which witness was chief actuary) now out on investment?"

10. For that the Court erred in sustaining the objection of the defendant to the following question of the plaintiff asked of the defendant Kirkpatrick: "What is the rate of interest that you are now earning on money of that sort, what do you average?"

11. For that the Court erred in sustaining the objection of the defendant to the following question propounded by the plaintiff to the witness Kirkpatrick. "Now, can you tell us what Government securities will pay, what percentage an investment in Government securities will be if the investment were made as of approximately now, what can you get on Government issues—?"

12. For that the Court erred in sustaining the objection of the Court to the following question asked by the plain-
[fol. 202] tiff of the witness Kirkpatrick: "Now, what rate of return could be safely obtained on first-class listed securities other than Government issues, in your judgment, now, Mr. Kirkpatrick?"

13. For that the Court erred in giving the general affirmative instruction in favor of the defendant as to the alleged violation of The Safety Appliance Act.

14. For that the Court erred in separate and severally refusi g written charges requested in writing by the plaintiff.

15. For that the Court erred in refusing to give to the jury written charge No. 1 requested in writing by the plaintiff.

16. For that the Court erred in refusing to give to the jury written charge No. 4 duly requested in writing by the plaintiff.

17. For that the Court erred in refusing to give to the jury the written charge duly requested by the plaintiff to the effect that if the jury believed the evidence, they

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could not find that the plaintiff was guilty of any contributory negligence.

18. For that the Court erred in refusing to give to the jury the written charge duly requested in writing by the plaintiff substantially to the effect that if the jury believed the evidence, they must find that the engineer failed to stop the train within a reasonable time after the signal lights disappeared from his view.

19. For that the Court erred in over-ruling objection of the plaintiff to the question to the defendant's witness, [fol. 203] Nichols, as to whether or not the written rule in evidence rule No. 1011, was disregarded as a common practice among railroads.

20. For that the Court erred in asking on its own volition the question of the defendant's witness, Nichols, whether or not said rule was, as a matter of common practice, disregarded.

21. For that the Court erred in the comment made by the Court of its own volition upon the testimony of the plaintiff's witness, Dr. Thuss, while the deposition of said witness was being read to the jury, said comment being substantially to the effect that witness was trying to show off his learning and that the Court would like to have him present to deal with him.

22. For that the Court erred in its oral charge to the jury in charging substantially to the effect that contributory negligence on the part of the plaintiff would bar his right to recover.

23. For that the Court erred in that portion of his oral charge to the jury substantially to the effect that if the employee was guilty of negligence proximately contributing to his injury he could not recover, to which exception was duly reserved by the plaintiff.

24. For the Court erred in charging the jury in his oral charge that there was no evidence of any defect in the hand brake or the automatic brake.

25. For that the Court erred in that portion of his oral charge to the effect substantially that if the plaintiff negligently set the hand brake or the automatic coupler on L&N car No. 20024 and that was the proximate cause of the

[fol. 204] plaintiff's injury, he could not recover, to which exception was duly taken.

26. For that the Court erred in that portion of its charge to the effect that if the plaintiff was negligent, it could be considered in diminution of damages.

27. For that the Court erred in that portion of its oral charge substantially to the effect that if the plaintiff's injuries were directly or proximately caused by the plaintiff's own negligence, he could not recover, to which exception was duly reserved.

28. For that the Court erred in its oral charge to the jury.

Jackson, Rives & Pettus, By J. K. Jackson, Attorneys for Plaintiff.

818 Massey Building, Birmingham, Alabama.

PRESENTATION

The foregoing motion has been presented to me as Judge of the United States District Court of the Middle District of Alabama on this the 10th day of December, 1947, and I do hereby direct that the said motion be marked filed in this cause as of said date, and I do hereby direct that the 7th day of January, 1948, at 11 o'clock A. M., in my chambers, at Montgomery, Ala., be appointed as the time and place for the hearing and argument of said motion for a new trial to which time the hearing of this motion shall be continued and of which it is ordered that the clerk of this Court give notice to Jackson, Rives & Pettus, 818 Massey Building, Birmingham, Alabama, as attorneys of [fol. 205] record for the plaintiff and Alto V. Lee, III, of Dothan, Alabama, attorney of record for the defendant.

Done th-s 10th day of December, 1947.

C. B. Kennamer, Judge Presiding at Trial of Case.

NOTIFICATION

To Honorable Alto V. Lee, III, as Attorney for Defendant:

Please take notice that the above and foregoing motion for a new trial will be presented to Honorable C. B. Kennamer as Judge of said Court on December 10, 1947, at which time Judge Kennamer will be requested to mark

said motion filed and to set the same down for hearing and argument and to notify counsel for the plaintiff and counsel for the defendant of the time and place so appointed for the hearing of said motion.

Jackson, Rives & Pettus, By J. K. Jackson, Attorneys for Plaintiff.

CERTIFICATE AS TO SERVICE

I, J. K. Jackson, one of the attorneys for the plaintiff in the above entitled case, do hereby certify that I have caused to be mailed, postage prepaid, and by registered mail, a true and correct copy of the above and foregoing motion for a new trial to the Honorable Alto V. Lee, III, Attorney at Law, Dothan, Alabama, the attorney of record for the defendant in this cause on this the 9th day of December, 1947, and I also caused another copy of the said [fol. 206] motion to be mailed to the said Honorable Alto V. Lee, III, by air mail, postage prepaid, on this the 9th day of December, 1947.

J. K. Jackson, As One of the Attorneys of Record for the Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL—Filed January 28, 1948

The motion to set aside the verdict of the jury in this case and grant a new trial, made and filed by the plaintiff through his attorneys, was heard by the Court on the 23rd day of January, 1948. Argument of counsel for the plaintiff and defendant was heard on the said motion, and the Court on having fully considered the same, and having reviewed the transcript of the record of the trial is of the opinion there was no substantial error in said trial prejudicial to rights of the plaintiff, and that on the issues submitted to the jury the verdict of the jury should not be set aside.

It is ordered, adjudged, and decreed by the Court that the said motion be, and the same is, denied.

This 28th day of January, 1948.

C. B. Kennamer, United States District Judge.

[fol. 207] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action No. 246-D

NEROY CARTER, Plaintiff,

vs.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY, a Corporation, Defendant

JUDGMENT—Filed January 28, 1948

On this day came the parties to this cause, in their own proper persons, and with their Attorneys of Record, and issue being joined, came a jury of good and lawful men, who having been duly sworn and impaneled according to law, on their oaths do say:

"We, the jury, do find the issues in favor of the Defendant."

It is, therefore, considered, ordered and adjudged by the Court that judgment for the defendant be, and the same is hereby entered in this cause, and that the defendant have and recover of the Plaintiff all costs in this behalf expended, for the recovery of which execution may issue.

This 28th day of January, 1948.

C. B. Kennamer, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL—Filed January 30, 1948

It is now ordered, adjudged, and decreed by the Court that the order and judgment of the Court, made and filed on January 28, 1948, denying plaintiff's motion to set aside the verdict of the jury and grant the plaintiff a new trial, be, and the same is, now amended to show that the plaintiff duly excepted to said action by the Court.

[fol. 208] This 30th day of January, 1948.

C. B. Kennamer, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed March 19, 1948

Notice is hereby given that Neroy Carter, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the judgment rendered in this action on December 3, 1947, upon a verdict in favor of the defendant and from the final judgment made and entered in this action on January 28, 1948, and amended on January 30, 1948, wherein and whereby the plaintiff's motion to set aside the verdict of the jury and grant the plaintiff a new trial was denied.

J. Kirkman Jackson, Attorney for Appellant, Neroy Carter.

Jackson, Rives & Pettus, 818 Massey Building, Birmingham, Alabama, of Counsel.

[fol. 209] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD—Filed March 18, 1948

The plaintiff, Neroy Carter, hereby designates the following as those portions of the record and proceedings herein which he deems should be contained in the record on appeal of this cause to the United States Circuit Court of Appeals for the Fifth Circuit:

1. Summons and Complaint and any amendments thereto (including the return of the officers as to the service of process upon the Defendant).

2. Answer of Defendant and any amendments thereto.

3. All the evidence taken or offered at the trial of the case as set forth in the official Reporter's transcript of the evidence, together with the depositions of Dr. William G. Thuss, of Birmingham, Alabama, and Mr. James L. Kirkpatrick, of Birmingham, Alabama, and together with any exhibits offered in evidence at the trial of this cause.

4. The Court's oral charge to the jury.

5. All written charges of the Plaintiff duly requested in writing by him, both given and refused by the Court.

6. The verdict of the jury and the judgment of the District Court rendered in response thereto, dated December 3, 1947.

7. The Plaintiff's motion for a new trial.

8. The judgment of the Court, dated January 28, 1948, overrul-ng and denying the Plaintiff's Motion for a new [fol. 210] trial, together with the amendment of said judgment dated January 30, 1948.

And such other matters as under the new Federal Rules for Civil Procedure or the Rules of the Supreme Court of the United States the Clerk may be required to certify.

J. Kirkman Jackson, Attorney for the Appellant.

818 Massey Building, Birmingham, Alabama.

Certificate as to Service

I, J. Kirkman Jackson, Attorney for the Appellant, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Designation of Contents of Record to Honorable Alto Lee, III, Attorney of Record for the Appellee, on this 17 day of March, 1948.

J. Kirkman Jackson.

Bond on appeal for $250.00, approved and filed March 18, 1948, omitted in printing.

[fol. 211] In United States District Court

[Title omitted]

Order Transmitting Original Exhibits—Filed April 8, 1948

In this cause, the Court being of the opinion that the or-ginal exhibits herein designated and which were a part of the evidence introduced on the trial of the above entitled

cause, should be inspected by the Appellate Court in connection with the transcript in said cause:

It is Therefore Ordered:

That the original depositions of Dr. William G. Thuss and James L. Kirkpatrick with five x-ray pictures attached and make exhibits thereto, designated as Plaintiff's Exhibit No. 2; a map of the railroad tracks, designated as [fol. 212] Defendant's Exhibit No. 1; and a picture of L. & N. car No. 20042, Designated as Defendant's Exhibit No. 2, Rule 12e of the A. and St. A. B. Ry., designated as Defendant's Ex. No. 6; which were introduced in evidence at the trial of this case, be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals, Fifth Circuit, for inspection by that Court as a part of the evidence and in connection with the transcript in said cause, and that on the final disposition of said cause by said Appellate Court, said Exhibits be returned to the Clerk of this Court.

Done this 8th day of April, 1948.

C. B. Kennamer, United States District Judge.

[fol. 213] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 214] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 20th, 1948

No. 12328

NEROY CARTER

versus

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPAN

On this day this cause was called, and, after argument by J. Kirkman Jackson, Esq., for appellant, and James N Frazer, Esq., for appellee, was submitted to the Court.

[fol. 215] OPINION OF THE COURT—Filed November 19, 1948

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12328

NEROY CARTER, Appellant,

versus

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the Middle District of Alabama

(November 19, 1948)

Before McCord and Lee, Circuit Judges, and Mize, District Judge

LEE, Circuit Judge:

This suit as originally filed by the appellant, plaintiff below, claimed damages of the appellee, defendant below, under the Federal Employers' Liability Act for injuries sustained through the negligence of defendant's employees

while he was in the service of the defendant as a trainman [fol. 216] on a train being operated by defendant in inter state commerce. By amended petition, he included a cause of action under the Federal Safety Appliance Act. The injuries were alleged to have occurred during switching operations by the defendant's train crew at and near the plant of the International Paper Co., in Panama City, Florida, in connection with an interstate movement. In its answer, the defendant denied that the injuries were attributable to its negligence and alleged that the plaintiff had been hurt as the result of his own negligence which proximately contributed to the injuries. On the day of the trial, plaintiff, by amended petition, alleged that he was injured by reason of the violation by defendant of the Safety Appliance Act in permitting a car to be used in interstate commerce unequipped for coupling automatically by impact. The case was tried to a jury, and, upon request of the defendant, the court below in its charge instructed the jury that plaintiff's injuries were in no wise attributable to a violation of the Safety Appliance Act, and that the jury should not consider this element in arriving at a verdict. The trial resulted in a verdict for the defendant, and from the judgment entered thereon, the plaintiff appealed.

The evidence is without serious conflict and may be briefly summarized as follows: While the train of defendant was at Panama City, it engaged in switching operations which were under the supervision of the plaintiff, who was acting in the stead of the conductor who at the time was filling in some reports in a nearby shack. Early in the switching operations, a woodrack car, loaded with pulpwood, was spotted on the main-line track; later in the switching opera- [fol. 217] tions, it became necessary to couple on to and to move it. Just prior thereto, the engine had coupled onto some seven or eight boxcars, and the engineer, responding to a signal from the plaintiff, moved the string of boxcars up to the woodrack car for the purpose of making the coupling. Whether because plaintiff himself had set the coupling improperly or because the coupling was defective, the impact failed to effect automatically a coupling, and the woodrack car, from the impact, moved along the main line and onto a siding. Thereupon, the plaintiff ran after the moving car and upon overtaking it mounted its bulkhead and set the hand brake, bringing it to a stop. He testified that, when he brought the woodrack car to a stop, he looked

up and saw the engine and boxcars bearing down on him out of the night at an excessive speed; that the cars attached to the moving engine struck the woodrack car a second time; and that, while the coupling worked automatically on this second contact, coupling the woodrack car with the rest of the train, the jar or jolt of the collision threw him onto the car floor, where the pulpwood, dislodged by the impact, fell and rolled across him. It was mainly upon plaintiff's evidence that the court below acted in instructing the jury that the Federal Safety Appliance Act was without application. This instruction is chiefly relied on by appellant as constituting reversible error. In this we do not agree.

The failure of the coupling to function automatically upon the first impact did not result in injury to the plaintiff. His injuries occurred when the train engineer, after this failure, in response to his signal to come ahead, continued to move [fol. 218] forward, striking the woodrack car a second time. The train crew, with the exception of the plaintiff, all testified that the train was moving slowly, about four to six miles an hour; that they were not aware that the first coupling had failed, nor were they aware that the woodrack car had moved and was running wild as a result of the impact. Plaintiff admitted signalling the engineer to come ahead after the coupling failed the first time. He admitted that the coupling worked perfectly the second time. His injuries, therefore, may not be said to have resulted from a defective coupling. They clearly are chargeable to the second impact and the resulting fall.

Appellant argues that failure of the coupling to function automatically the first time resulted in the woodrack car moving forward and made it necessary that he board it and apply the brake to stop it; that the first failure to couple, therefore created a situation which resulted in the second impact; hence the original failure was the proximate cause of his injuries. The better view, we think, is that the failure to couple the first time created a condition or set the stage, with respect to which a new act was to operate. This new act began with plaintiff's signal to the engineer to come ahead, after the failure of the woodrack car to couple upon the first impact. It ended when the woodrack car automatically coupled on the second impact. In these circumstances, the failure to couple on the first impact was the remote, not the proximate, cause of plaintiff's injuries. The authorities cited by the appellant to the effect that one

failure to couple automatically is enough to sustain a charge that the Safety Appliance Act has been violated are without [fol. 219] application to the facts of this case. The court did not err in directing the jury to ignore this feature of plaintiff's alleged cause of action.

There was evidence to the effect that the woodrack car, after the first impact, moved from the main track on to a siding and into a curve of the siding, and that the woodrack car, on entering the curve, could not be seen by the engineer. Appellant contends that it immediately became the engineer's duty under the rules of the company, which rules were introduced in evidence, to bring his train to a stop. Oral testimony was introduced by defendant, over objection, to explain these rules. The overruling of the objection is assigned as error. As the rule relied on is ambiguous,* the testimony was properly admitted, to make clear the practice and procedure to which it applied. This evidence demonstrates that the rule which required the engineer to stop the train in switching when signals were "lost to view," had no reference to a temporary situation such as occurs when the train is moving on a curve, and it was not the practice to stop the train on a curve because some part thereof was temporarily out of view.

Appellant also contends that he was prejudiced by a part of the court's verbal charge and by the court's refusal to give a special charge which he had requested. The charge as it was given was a fair discussion of the law applicable under the evidence. Standing alone, the part of the charge of which the appellant complains might possibly have been [fol. 220] prejudicial, but, when it is considered in the light of the entire charge, we think, if any prejudice resulted, it was inconsequential. The requested charge dealt with the measure of damages, and, since the issue of negligence was considered by the jury and resolved by the jury in defendant's favor, a refusal to give the charge was harmless error.

No reversible error appearing, the judgment appealed from is

Affirmed.

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* The rule reads: "If, in switching, the signals are lost to view, stop must be made until signals can again be seen."

[fol. 221] JUDGMENT

Extract from the Minutes of November 19, 1948

No. 12328

NEROY CARTER

versus

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Neroy Carter, and the sureties on the appeal bond herein, J. Kirkman Jackson and Erle Pettus, be condemned in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 222] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 214 to 221 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 12328, wherein Neroy Carter is appellant, and Atlanta and Saint Andrews Bay Railway Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 213 are identical with the printed record

upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of November, A. D. 1948.

Oakley F. Dodd, Clerk, by J. A. Feehan, Jr., Deputy Clerk, United States Court of Appeals, Fifth Circuit. (Seal.)

[fol. 223] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,567. U. S. Court of Appeals, Fifth Circuit. Term No. 565. Neroy Carter, Petitioner, vs. Atlanta and Saint Andrews Bay Railway Company, a Body Corporate. Petition for writ of certiorari and exhibit thereto. Filed February 15, 1949. Term No. 565 O. T. 1948.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~565~~ 23

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for the Petitioner.

JACKSON, RIVES & PETTUS,
Birmingham, Alabama,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action under the Federal Employers Liability Act (R. 2) and the Safety Appliance Act (R. 20). It was commenced in the District Court of the United States for the Southern Division of the Middle District of Alabama.

The defendant had judgment. That judgment was affirmed in the court below, by the Court of Appeals for the Fifth Circuit.

Your petitioner, Neroy Carter, sued the respondent railway company for personal injuries received by him on February 2, 1946 at Panama City, Florida, while a trainman in its employ (R. 2).

As the Court below observes, the evidence is without serious dispute.

The accident occurred in the nighttime. It grew out of a switching operation controlled by light signals. The complaint charged that the injuries were received by the Petitioner as the result of the negligent operation of the cars at an improper rate of speed without regard to signals and in violation of the reasonably prudent and careful railroad operating procedures, as well as in violation of the Safety Appliance Act relating to automatic couplers. (R. 2, 3, 4, 5 and 20).

As shown by the map of the defendant introduced as Exhibit 1, there were multiple tracks at the point of the accident including main line, pass track, track No. 3, woodyard and lead tracks. The tracks ran generally in a northerly and southerly direction.

The car upon which the petitioner was riding at the time he was hurt was L. & N. Car No. 20042. It had been set out on the mainline (R. 59) south of the switch into the storage track (R. 27) and south of Pledgers Crossing and north of the lead track. From this point the intended switching movement was as follows: The engine, headed south, was to back up the mainline until north of the switch going into the storage tracks. It was then to proceed forward, going south on the inside storage track to couple to a box car, back out of the inside storage track and proceed into the outside storage track, where eight wood rack cars were to be picked up. After coupling to these eight cars

the engine, with the box car immediately next to it and the eight wood rack cars coupled to the box car, was to back out of the outside storage track onto the main line and thence north until the entire cut was in the clear, when the switch into the storage track would be thrown, and the cut moved south on the main line coupling to L. & N. Car No. 20042. Then all cars were to be pushed a distance of about a quarter of a mile (28 car lengths) into the woodyard and there placed at various points.

Carter occupied the position of swing brakeman or field man (R. 45). He had set L. & N. Car No. 20042 on the main line (R. 59) disconnecting the car from the engine, bleeding the air and preparing the coupler for the automatic coupling soon to be made (R. 107). Bleeding the air had the effect of setting the air brake on the car (R. 107).

After so placing the L. & N. Car the petitioner proceeded north to Pledgers Crossing (R. 107). He observed the engineer go into the inside storage track and couple to the box car of wood (R. 107). Then Carter instructed the engineer to go into the outside storage track and pick up the wood racks (R. 107). Carter returned to the L. & N. Car to be there when the coupling was attempted by the train, which had in the meantime pulled into the main line and was shortly to proceed south pushing the eight flats and the one box car (R. 107).

As the train proceeded south to make the intended coupling with the L. & N. Car, the other brakeman, Morrison, had taken his position at Pledgers Crossing to protect the train against vehicular traffic. He stood to the west of the train and on the engineer's side (R. 48) and as the train proceeded by him he climbed on a freight car about four or five car lengths ahead of the engine (R. 49) getting upon a corner of it. During this switching movement, the conductor had gone into a small shanty east of the main line where he was engaged in some paper work (R. 47) and

Carter was in charge of the operation. The other two members of the crew, Engineer Grant and Fireman James, were on the engine. Carter, standing by the L. & N. Car, west of the main line, gave the engineer the "slow, come ahead", so that the coupling could be made (R. 119 and 51). The coupling was attempted but failed on impact, and as Carter testified when he looked around at L. & N. Car No. 20042, after signalling the engineer, it was "rolling" (R. 108). It went south down the main line and into the lead track, going around a curve to the left (R. 109).

Carter testified that it was his duty to catch the car and set the brake upon it (R. 108) and that he ran 50 or 60 feet to do so, catching and getting upon it, where he straddled the bulkhead and applied the hand brake (R. 109) on the south end.

Going down-grade the runaway car had proceeded a distance of about six car lengths when Carter brought it to a stop. He looked up and saw the train bearing down on him out of the night and being at that time about twenty feet north of the north end of the L. & N. Car. Carter was astride the bulkhead on the south end of the car where he had just finished setting the hand brake (R. 111).

Carter braced himself against the anticipated impact. It occurred and caused the load in the car to shift to the north and Carter to be thrown from the bulkhead down onto the floor of the car (R. 111).

Just prior to the collision, Morrison, the footboard brakeman, who was riding in the cut about five cars ahead of the engine, came around the curve from the main line into the lead track (R 52). He testified he was looking for Carter at the time and he saw that the train and the L. & N. Car had not coupled (R. 52). He said it looked like there was about three car lengths between the head of his train and the L. & N. Car on which Morrison said he saw Carter

(R. 52). Thereupon Morrison testified he leapt ten or twelve feet to the ground and ran back across the pass track (then partially occupied by cars), and proceeded sufficiently far to the west so that his signal could be seen by the engineer (R. 54) whom he signalled to stop by giving the emergency or wash-out signal.

The speed at which the collision occurred is in dispute. Carter, the petitioner, said that in his judgment it was twelve to fifteen miles an hour (R. 111). Morrison, on the other hand, agreed more nearly with the version of the engineer that when he got off the train in order to stop it, it was traveling about five or six miles an hour (R. 54), and that it had begun to stop just about the time the collision occurred (R. 64). The brakes were never applied in emergency. While Morrison gave the wash-out signal calling for the application of the emergency brakes, the brakes were never applied in emergency (Testimony of Morrison—R. 55, and Testimony of Grant—R. 173).

The nature and extent of the petitioner's injuries are in dispute. The petitioner testified that he received injuries to his back which had caused him intense pain ever since. This was confirmed by the testimony of Dr. Thuss, a practicing physician of Birmingham, Alabama, whose deposition was taken and introduced at the trial. Dr. Thuss' diagnosis, confirmed by x-rays, showed a slipping forward of the last lumbar vertebra on the sacral segment. (See deposition of Dr. Thuss, page 5). Dr. Thuss diagnosed the petitioner's injury as a spondylolisthesis, which he said was a slipping forward of the fifth lumbar vertebra on the sacral segment with the impingement or the pressure or a partial collapse of the tissue between the vertebrae, which is referred to as the intervertebral tissue between the discs. The diagnosis of Dr. Thuss was confirmed by the testimony of Dr. Ellis, the chief surgeon of the respondent railroad company, who

said that Carter had a spondylolisthesis, but that it was a congenital infirmity. Dr. Ellis swore that the injuries didn't have anything to do with it. He said, "I think the thing just happened at that time." (R. 157). Dr. Ellis never denied the condition, only the cause of it.

Carter had been under the constant care and treatment of physicians since the time he had been hurt, including one siege of six weeks in Dr. Ellis' hospital in a cast, rigid on a board with his legs distended (R. 98).

The foregoing constitutes a general statement of the facts as shown by the evidence. There are further facts, favorable to the petitioner which should be mentioned for a proper understanding of the case. They are as follows:

1. It is shown without dispute in this record that the air brakes on the L. & N. Car (No. 20042) were set by Carter. He bled the air (R. 107). That sets the air brake on the car (R. 107). When the coupling was attempted a few minutes later with the train moving at that time about two miles an hour and coming ahead in response to Carter's signal to make the coupling, if the brakes had held or functioned properly even if the coupling had failed as it did, the L. & N. Car would not have moved off and begun its wild journey down through the yards in the dark. (See the testimony of Morrison, R. 57, and the testimony of Carter, R. 115). This is undisputed.

2. There was a company operating rule in force and effect at the time of the accident, known as Operating Rule 1011, and applicable to the conduct of engine men. The pertinent and concluding sentence of this rule is as follows:

> "If, in switching, the signals are lost to view stop must be made until signals can again be seen" (R. 43).

This accident occurred in the nighttime. The governance and control of the engine was by means of signals passed

to the engineer by the brakeman. The evidence shows without dispute that under these conditions and circumstances the rule was violated by Grant, the engineer. Grant couldn't see Morrison after he got aboard the train even though the train was moving at the time on a straight track (Testimony of Grant R. 145, and testimony of Morrison R. 50). And he couldn't see Carter after Carter ran east after the runaway car. If the engineer Grant had stopped the train as required by the rule when the lights of Morrison and Carter disappeared from view, the accident would not have occurred.

3. If the engineer had applied the brakes in emergency when Morrison gave the wash-out signal which the engineer either saw (or was negligent in failing to see, as it was his duty to look for the members of his crew) then according to his own testimony, confirmed by that of Morrison, the train could have been stopped short of the second impact which caused the collision (R. 54, 55 and 145). The engineer testified that he made a service application, which he said was a "slow stop" (R. 148).

On the other hand, there are two circumstances unfavorable to the petitioner which must be mentioned.

1. When L. & N. Car No. 20042 started off a runaway car and Carter started after it, he gave a signal to come ahead (R. 12). Grant, the engineer, says he received such a signal and acted on it (R. 131).

2. By way of preparation for coupling to L. & N. Car 20042 Carter opened both knuckles. Although denied by Carter (R. 119), the general superintendent of the railroad testified "such would diminish the likelihood of making a proper coupling as two pins would have to fall instead of one" (R. 181).

* * * * * * *

The Court below, in disagreeing with our contention that the Trial Court had erred in charging out any violation of the Safety Appliance Act observed:

> "The failure of the coupling to function automatically upon the first impact did not result in injury to the plaintiff. His injuries occurred when the train engineer, after this failure, in response to his signal to come ahead, continued to move forward, striking the woodrack car a second time. The train crew, with the exception of the plaintiff, all testified that the train was moving slowly, about four to six miles an hour; that they were not aware that the first coupling had failed, nor were they aware that the woodrack car had moved and was running wild as a result of the impact. Plaintiff admitted signalling the engineer to come ahead after the coupling failed the first time. He admitted that the coupling worked perfectly the second time. His injuries, therefore, may not be said to have resulted from a defective coupling. They clearly are chargeable to the second impact and the resulting fall.
>
> "Appellant argues that failure of the coupling to function automatically the first time resulted in the woodrack car moving forward and made it necessary that he board it and apply the brake to stop it; that the first failure to couple, therefore created a situation which resulted in the second impact; hence the original failure was the proximate cause of his injuries. The better view, we think, is that the failure to couple the first time created a condition or set the stage, with respect to which a new act was to operate. This new act began with plaintiff's signal to the engineer to come ahead, after the failure of the woodrack car to couple upon the first impact. It ended when the woodrack car automatically coupled on the second impact. *In these circumstances, the failure to couple on the first impact was the remote, not the proximate cause of plaintiff's injuries.* The authorities cited by the appellant to the effect that one failure to couple auto-

matically is enough to sustain a charge that the Safety Appliance Act has been violated are without application to the facts of this case. The court did not err in directing the jury to ignore this feature of the plaintiff's alleged cause of action" (Italics supplied).

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because

(a) It has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

Coray v. *Southern Pacific Co.*, 93 L. Ed. — (decided January 3, 1949);

Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615;

L. & N. R. R. Co. v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953.

The statutory authority under which jurisdiction is invoked is 28 U. S. C. A. 37 (Judicial Code, Section 240, amended).

The date of the judgment to be reviewed is November 19, 1948.

Questions Presented

Did the Court of Appeals err in concluding that the railroad's conceded violation of the Safety Appliance Act could not have proximately resulted in the injuries sustained and (thus affirming the District Court in directing a verdict in favor of the respondent for that Act's infraction), and

Did the Court of Appeals err in failing to reverse for the palpable errors committed by the Trial Court in his charge to the jury on the law of the case.

Reasons Relied On for Allowance of Writ

The Court below has decided a federal question in a way probably in conflict with

Coray v. *Southern Pacific Co.*, 93 L. Ed. — (decided January 3, 1949);

Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615;

L. & N. R. R. Co. v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the proceedings of the said Circuit Court had in the cause numbered and entitled on its docket "No. 12328, *Neroy Carter, Appellant,* v. *Atlanta & St. Andrews Bay Railway Co., Appellee,*" to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court and for such further relief as to this Court may seem proper.

NEROY CARTER,
Petitioner,
By J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

NEROY CARTER,
Petitioner and Appellant Below,

v.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion of the Courts Below

The District Court rendered its judgment without opinion (R. 207); the opinion of the United States Court of Appeals for the Fifth Circuit is reported in 170 Fed. 719.

Jurisdiction

This has already been set forth in the preceding petition and is here adopted and made a part of this brief.

Statement of the Case

Under "Summary Statement of the Matter Involved," *supra,* a sufficient statement is made, fully to understand this case, and it is here adopted by reference.

Specification of Errors

The Court below erred in its approval of the action of the District Court in directing a verdict in favor of the respondent for its admitted violation of the Automatic Couplers Act as being the remote, and not the proximate cause of petitioner's injury.

The Court below further erred in failing to reverse for the many errors of the District Court in its oral charge to the jury on the law of this case, which in one instance was tantamount to directing a verdict for the defendant.

THE ARGUMENT

Summary of the Argument

A. The respondent concededly having been guilty of an infraction of the Safety Appliance Act, the Court below erroneously concluded as a matter of law that such offense was too remote to be the proximate cause of the plaintiff's injuries.

B. The Court below erroneously concluded that the several errors committed by the Trial Court in its charge to the jury on the law of the case were not prejudicial.

Argument

A. In regard to directing a verdict for the respondent for its conceded violation of the Safety Appliance Act:

The Court will remember the facts in regard to this aspect of the case.

L. & N. Car No. 20042 had been spotted on the main line by Carter. He was alone there at the time. He testified (and nobody disputes this because no one is in a position to do so) that after bleeding the air out of the car and thus setting the brakes, he prepared the coupler so that it would couple automatically on impact (R. 107). When the cut of cars came down the main line to couple to L. & N. Car 20042, Carter who alone was standing there and saw what occurred, testified that the coupling failed and L. & N. 20042 was started by the impact—a runaway down the track.

Morrison also knew of his personal knowledge that the coupling had failed. He testified when the car on which he was riding left the main line and proceeded sufficiently far into the lead track for him to see L. & N. Car 20042 ahead of him in the darkness, he saw there was an interval of about three car lengths between it and the head of the train.

There is therefore no question in this record that the automatic coupling on L. & N. Car 20042 failed to couple on impact.[1]

At the conclusion of the evidence counsel for the defendant moved for a directed verdict as to the alleged violation of the Safety Appliance Act. This motion the Court stated it would grant (R. 188) and did so in its oral charge to the jury (R. 190).

We rely here upon the decision of the Supreme Court in *Louisville & N. R. R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 953. The facts of the case which are extra-

---

[1] That part of the Safety Appliance Act pertaining to automatic couplers is as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with *couplers coupling automatically by impact*, and which can be uncoupled without the necessity of men going between the ends of cars." (45 U.S.C. § 2) (Emphasis supplied).

ordinarily like those of the case at bar are stated by the Court in the following language:

> "The plaintiff below was a switchman in the employ of the defendants when he suffered the injury for which he recovered the judgment which was affirmed by the Supreme Court of Georgia, and which is here for review on writ of error.
>
> "The facts essential to an understanding of the question presented for decision are as follows:
>
> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and *failed in an attempt to couple to the five cars*, but struck them with such force that, although the engine with the car attached stopped within half a car length the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the tracks with the result that his right arm was crushed by the wheels and was amputated below the elbow." (Emphasis supplied.)

Here Carter may have signalled "come ahead." But this was contributory negligence at most and no defense at all as against a violation of the Safety Appliance Act.

One failure of an automatic coupler sustains a charge that the Act has been violated. It is immaterial whether it functioned perfectly before and after. Compare *Philadelphia & Reading Ry. Co.* v. *Auchenback*, 16 F. (2) 550 (cert. den. 2[illegible] S. 761) and *Myers* v. *Reading Co.*, 331 U. S. 477, 67 [illegible]. 1334, 91 L. Ed. 1615.

The Court below did not gainsay a violation of the Safety Appliance Act. On the contrary it conceded that it had occurred. It attempted to justify the action of the Trial Court in charging out preemptorily this phase of *Carter's*

case by saying that the violation did not proximately cause the injury.[2] It said:

> "In these circumstances the failure to couple on the first impact was the remote, not the proximate cause, of the plaintiff's injuries. The authorities cited by the appellant to the fact that one failure to couple automatically is enough to sustain a charge that the Safety Appliance Act has been violated are without application to the facts of this case."

In so concluding the Court below fell into the identical error of the Supreme Court of Utah in the recent case of *Coray* v. *Southern Pacific Company*, 185 Pac. (2) 963, here reversed on January 3, 1949. Mr. Justice Black observed:

> "The Utah Supreme Court reviewed the evidence here and held as a matter of law that the defective equipment did not proximately cause or contribute to the decedent's death. Court discussed distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability, and 'cause' in the 'philosophical sense' in that the stopping created a 'condition upon which the negligence of plaintiff's intestate operated', one perhaps of many causes 'so insignificant that no ordinary mind would think of them as causes.' The court added, however, that the stopping 'was not the legal cause of the result,' thereby classifying it as not 'a substantial, as well as actual factor in bringing about' the decedent's death.
>
> • • • • • • •
>
> "These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a

---

[2] No such reason motivated the District Court in charging out the Safety Appliance Act. He acted on one overruled and repudiated state decision to the effect that one failure of a coupling to work was not a violation of the Act. *Western & A. RR. Co.* v. *Gentle*, 198 S. E. 257 (R. 187). This action of the Trial Court could not be justified on the theory he adopted. The Court below attempted to justify it on other grounds, viz: lack of proximate cause.

motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

To paraphrase the rule of the Coray decision so as to make it here applicable: The coupler here was defective. For this reason alone the car became a runaway in the nighttime. True it is that Carter, darting in pursuit, gave a signal for his train to come ahead. Perhaps in doing so, he did not exercise the best judgment and he may have been guilty of negligence contributing to his own injury. But there had been a violation of the Safety Appliance Act. His own lack of care is no defense. Any way all of these various events are so inseparably related to one another in time and space that it was error not to let the jury decide the question.

B. As respects the manifest errors as to the law of the case in the Court's oral charge to the jury:

After directing the jury that it would be improper to find for the plaintiff for any violation of the Safety Appliance Act the trial court then undertook to charge on negligence and contributory negligence under the Federal Employers Liability Act.

The Court erroneously charged and repeated it no less than six times that if the plaintiff's negligence was the proximate cause of his injuries he could not recover in the action. We quote from the record in the language of the Trial Court in this respect:

". . . Under this Act if the employee is negligent, and the other fellow employees are also negligent, it would not defeat his right of recovery, the fact that he

was negligent, *unless his negligence was the proximate cause of the injury*" (Emphasis supplied) (R. 190).

The Trial Court further charged:

"If the plaintiff himself, who, under all of the testimony, negligently set the hand brake on the car, and *that was the proximate result of his injury, then his right of recovery would be cut off*" (Emphasis supplied) (R. 191).

And the Trial Court further charged:

". . . or if in setting that automatic coupling device he set it in a negligent manner, and that *was the direct and proximate cause of his injury, his right of recovery would be cut off*" (Emphasis supplied) (R. 191).

The Trial Court further charged:

". . . But *if you should find his own negligence was the proximate cause* of whatever injury followed, then it would make no difference about the extent or nature of the injury. Your verdict would have to be for the defendant" (Emphasis supplied) (R. 193).

The Trial Court further charged:

"If you find for the plaintiff, *and find he was not negligent in any manner, and that his injury was entirely the proximate result of the negligence of the engineer or some of the other employees at that time*, then you would award such measure of damages as in your judgment would reasonably compensate him for the injury that he has suffered" (Emphasis supplied) (R. 193).

The Trial Court charged further:

". . . but for his loss of time, earning capacity, and things of that kind, all would be proper matter for you to consider in awarding damages, if you find he is

entitled to any damages and *that his own negligence in no manner contributed to his injury*" (Emphasis supplied) (R. 193).

At the request of the petitioner, written Charge 3 was given in the manner following:

> "3. I charge you, as part of the law in this case, that the fact, if it be a fact, that the plaintiff may have been guilty of contributory negligence shall not bar his recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to the defendant" (R. 194).

Thereupon, by way of explanation, the Trial Court, immediately following his reading of this requested charge, gave the following additional instructions:

> "You gentlemen of the jury are not lawyers, and I'm going to call your attention to that charge. It might be a little misleading, *under some other instructions of the Court. This is a correct rule of law if there was negligence on both sides, but would not come into play if you should find his injury was directly or proximately caused by his own negligence*" (Emphasis supplied) (R. 195).

Exception was reserved to these portions of the Trial Court's charge and the attention of the Trial Court was called to the fact that it had omitted the word "sole" as applicable to petitioner's alleged negligence as a bar to recovery. Thereupon the Trial Court stated:

> "The Court: I will modify it to that extent. That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, it would not make any difference as to negligence on the other side" (R. 196).

Thereupon exception was reserved to that portion of the explanation to the effect that it "would not make any difference on the other side" (R. 196).

Exception was expressly reserved to the Court's gratuitous (and erroneous) explanation of the written charge #3 to the effect that while the rule therein stated is a correct rule, if there was negligence on both sides, but "would not come into play if you should find his own injury was directly or proximately caused by his own negligence" (R. 195) (Exception R. 196).

The Trial Court, in some way, got the proposition fixed in his mind that if the petitioner was guilty of any negligence whatever which proximately contributed to his injuries, this was a bar to his right of recovery. In accordance with this theory, no less than six times repeated, such was stated to be the law of the case, thus emphasizing and fixing in the minds of the jury that any contributory negligence whatever on the part of Carter would bar his recovery.

This, of course, is in direct violation of the Federal Employers Liability Act itself. The Act ordains liability if the carrier's negligence either "in whole or in part" causes the accident (§ 51 U. S. C. A. Title 45). Additionally and more specifically, the charge of the Court was directly contrary to Section 53 of the Federal Employers Liability Act (45 U. S. C. A. 53) which provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided* . . ."

(Then the Act goes on to say that contributory negligence will be no defense at all for violation of the Safety Appliance Act.)

The decisions giving effect to these two sections of the Act are myriad, of which it is necessary to cite only

Tiller v. *Atlantic Coast Line Ry. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

The attention of the Trial Court to these errors was invited as follows:

> "Your Honor said if the plaintiff negligently caused his own injury he could not recover. If the plaintiff by his own negligence proximately caused his injury he couldn't recover. Your Honor omitted 'sole.' In other words, if the plaintiff's negligence were the sole proximate cause, of course he couldn't recover." (R. 196.)

The Trial Court did not withdraw those portions of the oral charge excepted to; did not amend the same by adding the word "sole," but only "modified" them to the extent stated by saying:

> "That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, *it would not make any difference as to negligence on the other side.*" (Emphasis supplied.)

The last expression of the Trial Court (undertaking to correct the error, if you please) that "it would not make any difference as to negligence on the other side," is an egregious misstatement.

These errors, in the oral charge of the Trial Court were necessarily accentuated in the setting which we have above undertaken to describe. Of them the Court below decided that while standing alone they "might have been prejudicial, that considered in the light of the entire charge, if any prejudice resulted it was inconsequential."

This result was reached despite at least one of the six instances being in effect a directed verdict for the defendant. The Trial Court charged:

"If the plaintiff himself, *who under all the testimony, negligently set the hand brake on the car,* and that was the proximate result of his injury, then his right of recovery would be cut off." (R. 191.) (Emphasis supplied.)

Not only was it not true that "under all the testimony" the plaintiff "negligently set the hand brake on the car" as this charge categorically states but there was not a scintilla of evidence to that effect.

This was the general charge for the defendant. Yet the Court below says it was not prejudicial.

The Conclusion

The trial of this case in the District Court was replete with many errors. Some of them were seriously prejudicial to the petitioner, and as we submit, effectively precluded his obtaining a proper determination of his case.

In the foregoing brief we have not undertaken to raise all of them. We have undertaken to cabin our discussion to only two. In considering them we ask this Court to give proper weight to the cumulative effect of these errors and the many others disclosed in the record, which we have not here paused to argue. Weighed up together, the whole effect is conclusive.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Birmingham, Alabama,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 23

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

APPENDIX "A" TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Birmingham, Alabama,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

APPENDIX "A" TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

FOREWORD

The following depositions having been omitted from the printed record and being here only as original exhibits, are for the convenience of the Court, printed as Appendix "A" to Brief of Petitioner. As so printed the depositions have been duly correlated with the several rulings of the Trial Court and the colloquies of counsel in respect to said depositions.

DEPOSITION OF DR. WILLIAM G. THUSS

Witness for the Plaintiff

DIRECT EXAMINATION

Q. (BY MR. JACKSON): Will you please state your name and place of residence?

A. W. G. Thuss, Birmingham, Alabama.

Q. In what profession are you engaged?

A. Industrial surgeon.

Q. Are you a graduate of any medical college, and if so, what college, and what year did you graduate, and what degree did you get?

A. I graduated at Vanderbilt University, Nashville, Tennessee, in 1920; degree of M.D.

Q. Have you ever served in any hospital or infirmary as an intern or house surgeon or been connected with the staff of any such institution?

A. Yes.

Q. When and where did that service occur, Doctor?

A. I was intern at St. Thomas Hospital in Nashville in 1917 to 1920; that was before I finished school. I was resident surgeon at St. Luke Hospital in New York City in 1920 to 1922.

Q. How long have you been practicing medicine in Birmingham, Alabama?

A. Since 1923.

Q. You are a member of the—you are an accredited medical man of Alabama at this time?

A. Yes, sir.

Q. I will ask you to state whether or not you specialize in any particular branch of medicine, and if so, what branch?

A. Yes. I specialize in industrial traumatic surgery and its related subjects.

Q. Do you know Neroy Carter, the plaintiff in this case?

A. I know him by virtue of having examined him.

Q. You have examined him then, you say?

A. Yes.

Q. Do you recollect about when you made that examination, Doctor?

A. About the middle of March, 1946.

Q. I wish you would state for the record briefly of what the examination consisted, and the findings that you made from that examination, the conclusions that you reached.

A. After an interview, history, the man was observed as to the way he walked, mentality; he was stripped and complete physical examination insofar as his complaints was carried out; his compiaints were directed to his back lumbar areas and his left hip; and, to a less degree, encircling each groin toward the front. The examination was a visual and a physical and an objective examination. The visual evidence of abnormalities was considered; the physical findings, such as muscular stiffness, spasm, limitation of motion, and his complaints of pain, whether they were localized, at what point they were localized, and to what

points they extended, his reflexes and his muscle development.

Q. From the examination of these various matters, both objective and subjective, did you arrive at any conclusion as to whether or not there was anything wrong with him?

A. Yes.

Q. What was your conclusion, Doctor?

A. I came to the conclusion that he had something wrong with his back; that he had some condition in his back that was responsible for his stiffness and his pain, his limitation of motion, his reflected pain.

Q. Did you have some x-rays made of this man?

A. Yes, sir.

Q. Have you got those x-rays?

A. Yes, sir.

Q. I wonder if you would produce them?

A. Yes.

Q. I will ask you to state whether or not the conclusion that you reached from the objective and subjective symptoms that you have just described, did that find any confirmation in the x-rays?

A. Yes, sir.

Q. I will ask you to take one of the x-rays that you say confirmed your clinical findings and look at it.

A. This x-ray here (indicating) shows more than the other x-rays, because it is the part of the back that has an exaggerated curvature, and shows a slipping forward of the last lumbar vertebra on the sacral segment.

MR. JACKSON: Now, I want to offer that.

THE WITNESS: This is what we call a spot-x-ray; it was taken of this particular area rather than one of these large films, which are more generalized; that is a localized picture, film.

MR. JACKSON: I want to offer that x-ray in evidence, and give it to the Commissioner to be marked as Exhibit 1 to the testimony of Dr. Thuss.

Q. Doctor, what is spondylolisthesis?

A. Spondylolisthesis is a slipping forward of the fifth lumbar vertebra on the sacral segment, with the impingement or the pressure or a partial collapse of the tissue between the vertebrae, which is referred to as the disc, or is referred to as the inter-vertebral tissue between the discs.

Q. Is that the condition you have just described in other language?

A. Well, he has a slipping forward of the fifth lumbar vertebra and an exaggerated curve, and I think it could be classified as a spondylolisthesis.

Q. That, in other language, as I understand it, involves a displacement of one of the vertebra on the column?

A. That is right.

Q. Now, Doctor, as I understand it, the vertebrae in a man's back house the spinal cord? That is correct, isn't it?

A. Yes, sir.

Q. There is a canal that traverses a man's back bone through his spinal column down which the spinal cord goes? That is correct, isn't it?

A. Yes, sir.

Q. Now, would the slipping forward, the spondylolisthesis that you have described, could that have the effect of impinging on the spinal cord or any of the nerves which come out of it between the two vertebrae that you are talking about?

A. That associated with the other abnormality could cause nerve pressure either against the cord or against the spinal roots or the nerves coming off of the cord. The reason that I put "the other abnormality" is that, as a rule, you don't find the spondylolisthesis without some other abnormality; it isn't usually just single.

Q. I don't exactly understand what you mean by that. Will you explain that a little further?

A. What I mean is that you don't find spondylolisthesis existing as a single entity; it is usually accompanied by a

partial collapse or something involving the intervertebral tissue there.

Q. Now, were they any objective symptoms, aside from the x-rays, that you discovered in your examination of this man which would bear out the conclusion that there had been a nerve injury or impairment?

A. The objective evidence which would indicate some nerve involvement would be the fact that the man kept his back stiff, rigid, that you could see the spasm of the muscles; that was the only objective evidence of nerve injury; the other was subjective symptoms which you were able to detect.

Q. Did you ascertain any points of tenderness in his back?

A. Yes.

Q. Were they at a spot which would corroborate your diagnosis that you have made?

A. Yes. The points of tenderness were along the path of the left sciatic nerve.

Q. The left sciatic nerve?

A. Yes, sir.

Q. Did you observe any rigidity or tendency to stand stiffly in his back?

A. Yes, sir.

Q. Was there any limitation of motion or flexibility in his posture?

A. Yes, sir.

Q. Now, as to the subjective symptoms, Doctor, what were they?

A. The subjective symptoms were his complaint of pain and tenderness on pressure along the nerve, along the sciatic nerve on the left side, his complaint of weakness in the back, his complaint of limitation of motion, his complaint that he tired easily after he was up for any period of time.

Q. I believe you have testified that, in your professional opinion, there was present an intervertebral disc syndrome?

A. In my opinion, the symptoms that this man had, with his physical findings, suggested that possibility. It would warrant, of course, further investigation.

Q. When you say "further investigation", what do you mean by that?

A. Here we have a man that gives a history of having injured his back; he hasn't got well, he still complains. He obviously has pain; his pain is referred along the path of one of the larger nerves going down the leg, which leads us to believe that there might be some pressure along the root of that nerve where it leaves the spinal cord. We know that there is a condition which exists that we refer to as an intervertebral disc, which is due to an abnormality or a destructive condition, with a partial collapse or disintegration of this disc producing herniation. In the herniation, if it is the herniation of the disc—of the disc material into the canal, then to further confirm that diagnosis it would be necessary or it would be advisable to inject some radiographic substance into the spinal canal. At the present time they are using pantopaque, which is injected into the canal, and then, after the solution is injected, x-rays are made and the pantopaque is removed from it, drawn back out of the canal. By comparison with the x-rays, the various x-rays which are taken, and by obstructions above or below the point of condition, or the intervetebral disc, it is possible to determine if there is an actual protrusion of this disc into the canal.

Q. Now, when you speak about "disc", what do you mean when you use the expression "disc" in connection with a man's vertebrae?

A. The disc refers to the tissue between the vertebrae; that is a normal fibrous tissue which absorbs the shock and gives a certain amount of motion. If something develops where that tissue undergoes degeneration, and it begins to bulge into the canal, herniation, or nucleus pulposus is another name, but it means, roughly, intervertebral disc.

Q. Now, you used the expression "herniation". What

did you mean by that in respect to the condition that you were talking about?

A. Herniation means that the tissue has gotten out of its normal position and it is pressing against some other part or organ of the body.

Q. And in this particular case, when you use the word "herniation", you mean that some part of the bony structure or the discs are impinging against some nerve, either in the spinal cord or immediately adjacent thereto?

A. The herniation would refer more to the intervertebral discs and not to any bony structure, because the bony structure, unless there was some destructive process, which apparently there is no sign of, would not be a herniation.

Q. But, nevertheless, the herniation does involve in this case the pressure of the disc on some aspect of the nervous system, or could, as I understand.

A. That is a possibility, with this series of symptoms that the man has.

Q. With the series of symptoms that the man has? All right. Now, assuming, Doctor, that this man was involved in a railroad accident, in February, 1946, where he had a very serious blow to his body in that region of which he made complaint, could this condition that you have described, could that be ascribable to that kind of accident?

MR. JACKSON: You objected to that, Alto.

MR. LEE: In taking this testimony Mr. Jackson and I had an agreement that he would note objections at the point appearing in the testimony, and on the trial of the case we would assign our grounds; and to that point we would assign the ground that it is incompetent, irrelevant and immaterial and based upon a hypothesis which is not founded upon the evidence in this case.

THE COURT: Overrule the objection.

MR. LEE. Except.

THE COURT: Mr. Pettus, is there considerable more of this same deposition?

MR. PETTUS: What's that, your Honor?

MR. JACKSON: Your Honor, we are now on page 10 and the deposition runs through 25.

THE COURT: Gentlemen, I think that deposition is out of all length. You ask him what it is, and ask him what he means by that.

MR. PETTUS: When he speaks about a spondylolisthesis we have got to find out what he means.

THE COURT: Yes, but he answers and then you again ask him what it means.

A. Yes, sir, it could be. The fact of the character and severity of the injury plays no particular part in the development of this disc syndrome that we have been speaking about. The disc syndrome oftentimes results from a very trivial act. I had a patient to develop a disc that was operated on and the operation found the disc, the man reached over to pick up a cake of soap and twisted in doing it. The severity of the transaction does not necessarily—

Q. But it can be caused by a trauma?

A. Oh, yes.

Q. Are you familiar, in its broad outlines, with the kind of work that a railroad brakeman does?

A. Yes, sir.

Q. I think you have testified on a previous occasion that one time in your youth you followed that vocation for a time, didn't you?

A. Yes, sir.

Q. I will ask you to state whether or not, in your professional opinion, Mr. Carter, the man that you examined and about whom you are testifying, is physically able to carry on the vocation of a railroad trainman—brakeman?

A. Brakeman?

MR. JACKSON: Alto, you object to that.

MR. LEE: That objection is noted on the grounds that it is incompetent, irrelevant and immaterial, based on a hypothesis not founded on the evidence in this case, and the witness is not properly qualified to give such an answer.

THE COURT: Overruled.

MR. LEE: Exception.

Q. Yes.

A. No, sir.

Q. Now, one final question. The ordinary x-ray in a matter of this sort shows only the bony displacement, as I understand it. That is correct, isn't it?

A. Yes, sir.

Q. And in order to make this further examination by means of the x-ray that you have described, it is necessary to inject this fluid into the canal, this radiographic substance?

A. Yes. He would have to have some radiographic substance for the purpose of comparison.

Q. Yes.

A. The ordinary x-ray wouldn't show it.

Q. I see. Now, Doctor, are you familiar with Drs. Key and Conwell's Book on Bones?

A. Yes, sir.

Q. Is that a standard work?

A. Yes, sir.

MR. JACKSON: That is all.

MR. JACKSON: Now, the cross examination. You want to read?

MR. LEE: Yes.

CROSS EXAMINATION

On cross examination of the witness Dr. Thuss, Mr. Lee read the questions and Mr. Jackson the answers.

Q. (BY MR. LEE): Dr. Thuss, you spoke of the specialty or your practice as that of an industrial surgeon. To the layman just exactly what do you mean by that, please, sir? State for the benefit of the record there what you mean by the term industrial surgeon.

A. I am the zone surgeon, so-called in some instances, in others the district surgeon for various casualty and insurance companies and also for bus lines, truck lines.

Q. You mean that you specialize—

A. We specialize in the—

Q. In the treatment of employees engaged in industry in different areas or zones in and around Birmingham?

A. Yes, sir.

Q. Is that the way I understand you?

A. Yes, sir.

Q. I believe you testified that you saw Mr. Carter back in March of 1946, around the middle of March?

A. I think that is when it was, yes, sir.

Q. Is that the only occasion during which you saw him, Dr. Thuss?

A. I think so.

Q. Over how long a period of time did you have occasion to see him and observe him during that examination, approximately, in your best judgment?

A. He was in here probably an hour—

Q. An hour?

A. —during which time I may have spent the greater part of that time examining him.

Q. Did you make your x-rays here at your clinic?

A. No, sir.

Q. Where were the x-rays made, Dr. Thuss?

A. They were made at the Jefferson Hospital.

Q. They were made under your direction and supervision, but you didn't see or further examine Mr. Carter after that time?

A. No, sir.

Q. This matter of the injection of this radiographic substance into the spinal canal, was that ever done as far as Mr. Carter was concerned?

A. I don't know.

Q. I mean here by you in Birmingham?

A. No, sir.

Q. Now, Doctor, at that time, in March, was there any evidence of any bruise or body injury that you could determine or observe from just a casual observation of the body—

A. No, sir.

Q. —of his back?

A. No, sir.

Q. In these pictures that you made or had made of Mr. Carter, was there any evidence of any fracture to any of the vertebrae?

A. None that I saw, no, sir.

Q. None that you saw? Doctor, I believe you said that this spondylolisthesis involved the fifth lumbar vertebra and the first sacrum? Is that right?

A. The first sacral segment.

Q. The first sacral segment? Beg your pardon. Now, in the makeup, from a layman's standpoint, of the back there, you have the lumbar spine and then the sacrum is immediately below the lumbar spine? That is correct, is it not?

A. Yes, sir.

Q. Now, there are five vertebrae in the lumbar spine? That is correct?

A. That is normal.

Q. Normal? There is sometimes six, but, as a matter of normality, there are only five?

A. That is right.

Q. Now, I believe in Mr. Carter's x-rays there he had only five lumbar vertebrae?

A. Yes, sir.

Q. Now, Doctor, was there any involvement of the fourth lumbar vertebrae in Mr. Carter's back there, that is with the fourth and fifth?

A. I don't understand what you mean.

Q. In referring to the spondylolisthesis, as you defined it on direct examination, that is the condition you find where you find spondylolisthesis, did you find any such condition with reference to Mr. Carter which would involve the fourth lumbar vertebra and the fifth lumbar vertebra?

A. As I understand it, you mean to ask if there would be a slipping forward of the fourth on the fifth?

Q. The fourth on the fifth or could it have been the fifth on the fourth, the converse? Could that be possible?

A. No; there was apparently no slipping forward. The spondylolisthesis only has reference to the fifth on the sacrum.

Q. The fifth sacrum?

A. The fifth sacrum. If you had a condition where the fourth and fifth were out of line, it would be more referred to as a dislocation or partial dislocation.

Q. And, in your opinion, then if there was any slipping there as to the fourth on the fifth, that would be referred to as a dislocation rather than a spondylolisthesis?

A. Yes, sir.

Q. Now, Doctor, is a spondylolisthesis a congenital deformity?

A. We are not sure; it might be.

Q. As a matter of fact, doesn't the majority of the medical profession now regard a spondylolisthesis as a congenital deformity?

A. No. Two weeks ago I had occasion to be in Atlanta, where there were some several hundred doctors doing that same type of work, and that was one of the things that came up. We had men there from New Orleans, Baltimore,

Boston and New York and this part of the country, and they couldn't agree as to whether it did result from a traumatic condition or whether it resulted from a gradual giving away, or whether in some instances, the man was born with it. I think probably the answer is that, in some instances, all of them would fall into one or more categories.

Q. You wouldn't mean to infer by that that every trauma would possibly result in a spondylolisthesis at that point, though, would you?

A. Fortunately, they do not.

Q. Now, I believe you have already testified, I believe, on cross examination that there was no evidence of any fracture at any point or in any of these x-rays that you made of Mr. Carter's back?

A. No, sir.

Q. I believe you further testified on direct examination to Mr. Jackson that there have been occasions or patients that you have observed where a spondylolisthesis occurred where there was no trauma? Is that correct?

A. Yes, possibly, although it is difficult to get any patient with an absolutely accurate history who doesn't give some history of trauma or injury at sometime or other, so just what part trauma plays in their particular complaint, each case has to be evaluated on its own merits.

Q. But when you examined Mr. Carter, there was no evidence of any sort of trauma, was there?

A. There wasn't any bruising.

Q. That is what I mean. Is that what you term objective?

A. That is what I meant—

Q. Yes, sir.

A. —when you said was there any bruising or contusions.

Q. That is what I have in mind.

A. I saw him some weeks afterwards, and I judge he had sufficient time to get over that, but the external evidence that we were able to see, first, was the man's complaint of the back, stiff, rigid; in walking he walked with a backward rigidity, maintained himself in that protective position.

Q. What I had in mind was external evidence there was as to the spots on his body--

A. There was no external—

Q. —body bruises, or anything like that?

A. No body bruises, no, no cuts and no scars.

Q. You did observe rigidity of his back in the manner in which he held himself, his posture, when he walked?

A. Yes, sir.

Q. And that was an objective symptom, and one of the objective symptoms that you referred to in Mr. Jackson's examination?

A. Yes, sir.

Q. What I had in mind with reference to this spondylolisthesis and trauma was an incident, I believe, of a patient you spoke of having had something involving some soap or something? Was that a spondylolisthesis?

A. That was a combination of spondylolisthesis and intervertebral disc. There was an element of trauma there. The man was in the shower of one of our industrial plants and the soap slipped out of his hand. He reached around to get it, it went back of him, and in reaching around he slipped and reached for it at the same time and immediately felt this pain in his back.

Q. But he slipped in turning but didn't fall as I understand.

A. Well, just as to how much he fell it is rather difficult to say whether he actually fell or not; he never could determine; it was a twisting, possibly.

Q. During your experience, have you ever observed spondylolisthesis where there was no evidence of trauma at all.

A. No. We have had patients which we felt from the x-ray had an exaggerated curve that the x-ray might interpret as being a possible spondylolisthesis, but they were symptom free, and, since they were, we attached no particular significance to it.

Q. Now, in this area there on these x-ray pictures, was there any evidence of any congenital deformity around that area? Will you please examine them, Doctor, and state whether or not that is true?

A. There is an area (indicating) that seems to be an incomplete fusion of the mural arch of the fifth lumbar vertebra.

Q. Will you identify that picture by number, please, sir, so that—

A. I think that (indicating) is the best one; that was the one I was looking upon.

MR. LEE: I will ask the Commissioner to designate that as No. 2.

THE WITNESS: I think that is the best one.

Q. Did you see any evidence in any of the pictures there of arthritis in the lower lumbar spine?

A. No. I don't attach any significance to any arthritic changes. I didn't see enough arthritis to mention it or to be concerned about it. As a matter of fact, the vertebrae are well formed, show no lipping. There are no significant arthritic changes.

Q. Did you see any evidence of any acrocinesia of this fifth transverse process on the ilium?

A. Yes. The transverse processes of the fifth lumbar are wider and do go over to the ilium.

MR. LEE: Is that picture numbered? I don't believe so, Mr. Commissioner. I will ask the Commissioner to number that picture No. 3.

Q. Doctor, would this be considered a recognized statement or definition of a congenital deformity: "It is a condition which a person is either born with or in the situations that are existing at birth which permit later in life the deformity to come to light." Would that be a fair statement or—

A. No, I don't entirely agree with that. I agree with the first part of it. A congenital condition, deformity, is something the person is born with.

Q. Well, could it be a condition existing at birth which permits it to later in life come to light, such as a deformity existing, but conditions existing later on down in life would permit it to come forth?

A. If the condition was there, and they are born with it, it is there all the time.

Q. It is there all the time, but it may not be manifest until a later stage? Could that be correct or come true?

A. Well, if you have a congenital condition that exists at birth, it exists all the time unless it can be surgically corrected, as the case of hare lips or palate, but a congenital condition or a condition that a child is born with—I think what you mean to say is it can be symptom free upon to a certain point.

Q. That is right; and then later symptoms appear?

A. That is possible.

Q. And still be a congenital condition?

A. A congenital condition, yes, sir.

Q. Now, as I understood, you told Mr. Jackson with reference to this herniation, you stated there was a possibility from the symptoms that you observed in reference to Mr. Carter, but you did not state that, in your opinion, there was a herniation, did you?

A. No, sir, I didn't. I think with the evidence at hand, certainly the case would warrant further investigation. This man should have further examination. He should have orthopedic consultation. He should have consultation with a neuro-surgeon, and then, after this consultation, they might deem it advisable to inject this radiographic substance into the spinal cord, with the idea of following the x-rays to the point to see if he does have a ruptured disc with pressure along the nerves' roots. I say that, knowing that some doctors, some very competent neuro-surgeons in this country, operate on such cases as we have here without the injection of the pantopaque solution. I think that the injection of the pantopaque solution does a great deal towards confirming the diagnosis and is helpful.

Q. As I understand you, some neuro-surgeons do operate without going through that process, and still others go through it?

A. Well, Dr. Dandy, and Dr. Dandy was at Johns Hopkins, injected some, some he didn't, and Dr. Mixter, who was at Boston and one of the pioneers in this work, had the same work. Now, Dr. Caldwell and Dr. Echols, in New Orleans, made the statement that they inject most of theirs, for the purpose of diagnosis.

Q. In other words, it is more or less a difference of opinion among the medical profession as to whether or not that is helpful?

A. I think it is a matter of individuality as to whether the doctor is sure of his own diagnosis. Some of them operate with the idea that the disc, the disc syndrome would demand a surgical investigation.

Q. Then, as I understand your testimony, this last portion of it that is, some neuro-surgeons operate either before or after the injection of this radiographic substance, which you state is a matter of individuality to satisfy themselves with reference to their own diagnosis? Is that correct?

A. Yes. I think the injection is largely left up to the combination of surgeons and neuro-surgeons who are considering that individual case.

Q. Are operations for these conditions successful, Dr. Thuss?

A. I recently saw a survey of the results of a survey over a six-year period on approximately two hundred highly selected cases that were reviewed by one insurance company. I say selected, because, obviously, they had had thousands of back cases, but these cases were operated on by competent men over the country. They classified their results, and these figures are approximate but fairly close: Of these two hundred highly selected cases by this one particular company, over a six-year period—now, these cases were not reviewed to see whether these patients should or should not have been operated or whether they were well

operated or not well operated; all they said, here are two hundred cases that were paid on. The men were disabled so long, and the cost to us was so much; there was no question as to whether the operation was necessary or not necessary.

Q. But they were all operated on?

THE COURT: A good deal of this is not response to the questions asked, and a great, long dissertation by the doctor to show how learned he is.

MR. PETTUS: Will your Honor permit us to read that?

THE COURT: How is that?

MR. PETTUS: Will your Honor permit us to read that?

THE COURT: I reckon there is no other way. I don't know of any other. If I had that doctor here and being examined before me.

MR. PETTUS: Your Honor, it is material for this reason.

THE COURT: I know some of it is material.

MR. PETTUS: If the condition be curable by operation, of course, it would be vital; but this shows the operation is highly speculative and unsatisfactory in results.

MR. LEE: We object.

THE COURT: Well, some of it is highly speculative and don't know whether they would or not. Go ahead.

A. They were operated on by very competent men throughout the country. Of these two hundred—

THE COURT: He could have answered that question in four words; then he goes on making a great, long speech.

A. (continuing) . . . Of these two hundred cases they classified them as to good results and poor results. The good results were cases that got well in approximately a year. The poor results were cases that didn't get well in a year, or some of them apparently never did get well. The sum total was that approximately from sixty to sixty-six per cent were classified as good. The other forty per cent were classified as poor results.

Q. Could you give any break-down as to that thirty-four to forty per cent, as to the ones who did recover over a period of longer than a year?

A. They didn't recover at all, apparently. They were followed as far as they could be followed, and they were still having trouble. Now, those were the forty per cent, approximately forty per cent. Now, those results were quite optimistic in comparison to statistics which were gotten up by another company. Now, these statistics were published at considerable length in The American Journal of Surgery, but I do not recall the statistics, with the break-down on those cases. These were the most optimistic statistics that I have seen.

Q. And you haven't come in contact with any that did give a successful result in as much as eighty-five per cent of the cases in which they were operated on?

A. I believe if anybody said that they were getting eighty-five per cent results in their disc operations, we would just send them all of them. I do not believe anybody is getting any eighty-five per cent. This I do know, the Army operated on them for a while and they discontinued it.

Q. Doctor, at whose instance was this examination made of Mr. Carter?

A. At the request of Mr. Jackson.

Q. What were the charges therefor and by whom were you paid?

A. $50.00 for the x-rays and examination, and paid by Mr. Jackson.

MR. LEE: That is all.

REDIRECT EXAMINATION

Mr. Pettus read the questions and Mr. Jackson the answers.

MR. JACKSON: Just one more question.

Q. (BY MR. JACKSON): Going back to this two hundred that were operated on by this large insurance company, I think you testified that they were screened cases.

A. Highly screened cases.

Q. Highly screened cases? You mean by that, they were cases which the doctors who were making the examinations and doing the cutting, they thought that they had the best chance of successful outcomes of the operations in those two hundred cases? Is that right?

MR. JACKSON: Alto, you object to that.

MR. LEE: The objection is noted on the grounds of incompetency, irrelevant, illegal and immaterial, and not germane to anything in this cause.

THE COURT: Overruled.

MR. LEE: Exception.

Q. Well, just state what you mean by that?

A. Well, I think they were highly selected cases. I think they were cases where they had been thoroughly studied. I think they were cases where the doctors had gone over them carefully and undoubtedly were cases that the insurance companies had been consulted and their approval as to the operative procedure had been carried out. By "screened" they were selected and worked up; some of them had been discarded as being inoperative; some of them had refused the operation, and some of them had drifted elsewhere, but they were selected cases out of a large group.

THE COURT: I think the answer to that is probably objectionable, because he doesn't undertake to say that he has knowledge about that; only what he thinks about it.

MR. LEE: Objection was noted to the question on that basis.

MR. JACKSON: There was no objection to the question just answered.

MR. LEE: Well, objection to the previous question, "state what you mean about that".

Q. And they were also cases, I understand, that had the best chance to win in, too, weren't they?

A. I think so; I think so.

MR. JACKSON: That is all I want to ask him.

RECROSS EXAMINATION

MR. PETTUS: Re-cross by Mr. Lee.

Mr. Lee read the questions and Mr. Jackson the answers.

Q. (BY MR. LEE): That is based on statistical information that you received from that report, that testimony that you gave to Mr. Jackson.

A. This information was obtained from the Medical Director, along with their staff, of one of our large national insurance companies, and they were giving us, their doctors, this information because we come in contact with these cases.

Q. When you saw Mr. Carter, was he walking on his own volition or under his own power, or was he being carried at the time that you saw him? Was he mobile or immobile?

A. Well, he was ambulatory; he was walking.

Q. I believe I used the wrong word. What size man was he, Doctor?

A. He was a little over six feet and weighed a couple of hundred pounds, about two hundred or two hundred and twenty pounds.

Q. Between two hundred and two hundred and twenty when you saw him?

A. Yes, sir.

MR. LEE: All right.

MR. JACKSON: That's all of the examination for the doctor, Judge. Next man is named Kirkpatrick.

Mr. Pettus read the questions and Mr. Jackson the answers on direct examination.

DEPOSITION OF JAMES L. KIRKPATRICK

Witness for the Plaintiff
Direct Examination

Q. (BY MR. JACKSON): Will you please state your name and place of residence?

A. James L. Kirkpatrick, 13 Montevallo Lane, Mountain Brook, Alabama.

Q. In what vocation or profession are you engaged, Mr. Kirkpatrick?

A. That of actuary of the Protective Life Insurance Company.

Q. How long have you been in that profession or vocation?

A. Well, I have been in this capacity—in that capacity with this company since 1939. Prior to that time, for approximately seven years, with the Equitable Life of Iowa, at Des Moines.

Q. You have been an actuary then for approximately fifteen years?

A. Yes. I have been doing actuarial work since—well, I started it in the Summer of 1931, and made it a full-time career since 1932.

Q. And I believe that you are Chief Actuary for the Protective Life Insurance Company.

A. That is correct.

Q. You are familiar with mortality tables, are you not?

A. I am.

Q. That is a part of your job as an actuary, as I understand?

A. Yes, that is right.

Q. Could you just briefly state for the record what purpose the mortality tables serve in your business?

MR. LEE: We object to that as incompetent, irrelevant, illegal and immaterial, and not germane to the issues in this case.

THE COURT: Read the record.

MR. PETTUS: Could you just briefly state for the record what purpose the mortality tables serve in your business?

MR. LEE: That was for the purpose of life insurance business.

THE COURT: Overruled.

MR. LEE: Save the exception.

A. A mortality table shows the number of persons living at various ages, the number of people who are expected to die between one age and the next, and it shows other information, such as the probability of life and death, and some tables show the expectation of life. The main use of mortality tables in a life insurance company is as a basis of premium rate and policy reserve calculations.

Q. On the basis of these tables you can tell what a man's life expectancy is, assuming he is in good health, can't you?

MR. LEE: We note an objection on the same grounds: incompetent, irrelevant, illegal and immaterial, and not germane.

THE COURT: Overrule.

MR. LEE: Save the exception.

A. The table, of course, shows the expectation of life, and with regard to good health, in preparing the tables, all those who have had an examination within five years has been excluded in many tables, so that we have what we call an ultimate table; in other words, the ultimate mortality table is designed to reflect the mortality to be expected from the figures—

Q. If a man were born on April 17, 1912, which is the date of the birth of the plaintiff in this case, how old would he be on December 2, 1947, the date of the trial of this case? I think I figured that out—

A. Yes, I have. Thirty-five years and two hundred and twenty-nine days.

Q. Two hundred and twenty-nine days?

A. That is correct.

Q. What would be his expectancy, Doctor, based on these tables that we were just talking about?

MR. LEE: We object. Incompetent, irrelevant and immaterial, not germane to the issue.

THE COURT: To be competent it would have to be shown he was in normal health.

MR. JACKSON: No, sir. They have stated these tables are applicable to anybody.

MR. LEE: As long as they were in good health.

MR. JACKSON: No. He rejects that in his answer.

THE COURT: Well, overrule.

MR. LEE: Save the exception.

A. In order to answer that question, I might state that there are—I mean there is more than one mortality table in existence that has been used as a basis for computing insurance premiums and for computing rates of expectation—I mean computing expectation of life, and in order to answer your question, I would have to know what table.

Q. Well, on the basis of the table commonly used by insurance companies, what would be his expectancy?

MR. LEE: We object. It is incompetent, irrelevant and immaterial and not germane to the issue.

THE COURT: Overrule.

MR. LEE: Save the exception.

Q. On the basis of the table which you would use here in the performance of your duties?

MR. LEE: Same objection. Same grounds.

THE COURT: Overrule.

MR. LEE: Except.

A. Well, I will have to answer that in this respect. At the present time our reserves are based on the American Experience Table. However, we have just recently completed figures which will become effective on or around January 1, 1948, on the basis of the new 1941 Commercial Standard Ordinary Mortality Table.

Q. On the basis of your tables that are currently in use

in the country, as I understand it, or will be shortly in all insurance companies—

A. Some companies have already made the change, and, in many states, it is going to be required after January 1, 1948.

Q. By the matter of statute?

A. That is right.

Q. On the basis of those tables, what would be the expectancy of a man thirty-five years old, seven month and fifteen days—

MR. LEE: We object. Incompetent, irrelevant, immaterial, and not germane to the issues of this case, and not predicated on the man being in good health at the time that was made.

THE COURT: Overrule.

MR. LEE: Except.

A. In order to arrive at that, I have used an interpolation. The expectation of life at age thirty-five, according to the 1941 Commercial Standard Ordinary Table, is 33.44. At age thirty-six, it is shown in the table as 32.59. When one interpolates between those two expectations for the two hundred and twenty-nine days which have elapsed since age thirty-five, the expectation turns out to be 32.91.

Q. 32.91 years?

A. That is right.

Q. Now, Mr. Kirkpatrick, at the interest rate of 5 per cent, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy of a man 32.91 years?

MR. LEE: We object as incompetent, irrelevant, illegal and immaterial, and not germane to the issue in this case.

THE COURT: Sustain the objection on that.

MR. JACKSON: Could you hear us, your Honor, on the law on that?

THE COURT: Well, after we get through I will hear you on that.

A. (BY THE WITNESS): Will you please restate the rate of interest?

Q. Five per cent?

MR. LEE: Of course, he went ahead and had sustained the objection on that question. That would eliminate that second one.

MR. JACKSON: Was the objection first by your Honor sustained, and his request to restate the question?

THE COURT: Yes.

MR. LEE: That would be the same question, and the same ruling required there.

MR. PETTUS: We except.

Q. Now, Mr. Kirkpatrick, I will ask you the same question at the interest rate of five and one-half per cent?

MR. LEE: We object to that: incompetent, irrelevant, illegal, and not material to the issue in this case.

THE COURT: Sustained.

MR. PETTUS: We except.

Q. Mr. Kirkpatrick, at the interest rate of six per cent compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy, the life expectancy of 32.91 years?

MR. LEE: We object. Incompetent, irrelevant and immaterial; not germane to the issues in this case.

THE COURT: Sustain.

MR. PETTUS: We except.

Q. Are you familiar with the income earned by the money of this company now out on investment?

MR. LEE: We object. Incompetent, irrelevant, immaterial.

THE COURT: Sustain the objection.

MR. PETTUS: We except.

Q. What is the rate of interest that you are now earning on money of that sort, what do you average?

MR. LEE: We object. Incompetent, irrelevant and immaterial.

THE COURT: Sustain the objection.

MR. JACKSON: We except.

Q. Is there any substantial variation this year from what is was last year?

MR. LEE: If the Court please, that is a continuation of the same question on the same line to which that objection was noted.

MR. JACKSON: Mr. Lee and I specifically agreed he would reserve an objection to each question.

MR. LEE: That's right.

MR. JACKSON: And no such reservation to this question—

MR. LEE: I know, Kirk; but the same line.

THE COURT: I will let that stand, in the light of the ruling already made.

MR. PETTUS: We except.

Q. Now, can you tell us what Government securities will pay, what percentage an investment in Government securities will be if the investment were made as of approximately now, what can you get on government issues—

MR. LEE: We noted an objection to that. It is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

MR. PETTUS: We except.

Q. Now, what rate of return could be safely obtained on first-class listed securities other than Government issues, in your judgment, now, Mr. Kirkpatrick?

MR. LEE: We object. Incompetent, irrelevant and immaterial.

THE COURT: Sustained.

MR. PETTUS: We except.

MR. JACKSON: All right, I won't press you any further. I don't want to ask him anything further.

CROSS EXAMINATION

Q. (BY MR. LEE): You are not familiar with the matters involved in this litigation, are you, Mr. Kirkpatrick, that is, either of the parties, the earning capacity, or anything of that nature, are you?

A. That is correct. I know none of those facts.

MR. LEE: That is all.

MR. JACKSON: We offer the depositions in evidence.

MR. LEE: With the offer of them, we renew the same objections as are noted in the course of the reading, the reading of the questions and answers. I mean as a matter of record.

MR. JACKSON: I am not trying to get the testimony in evidence that your Honor ruled out. Just merely want to go through the offering of the depositions in the routine manner.

MR. LEE: Oh, no.

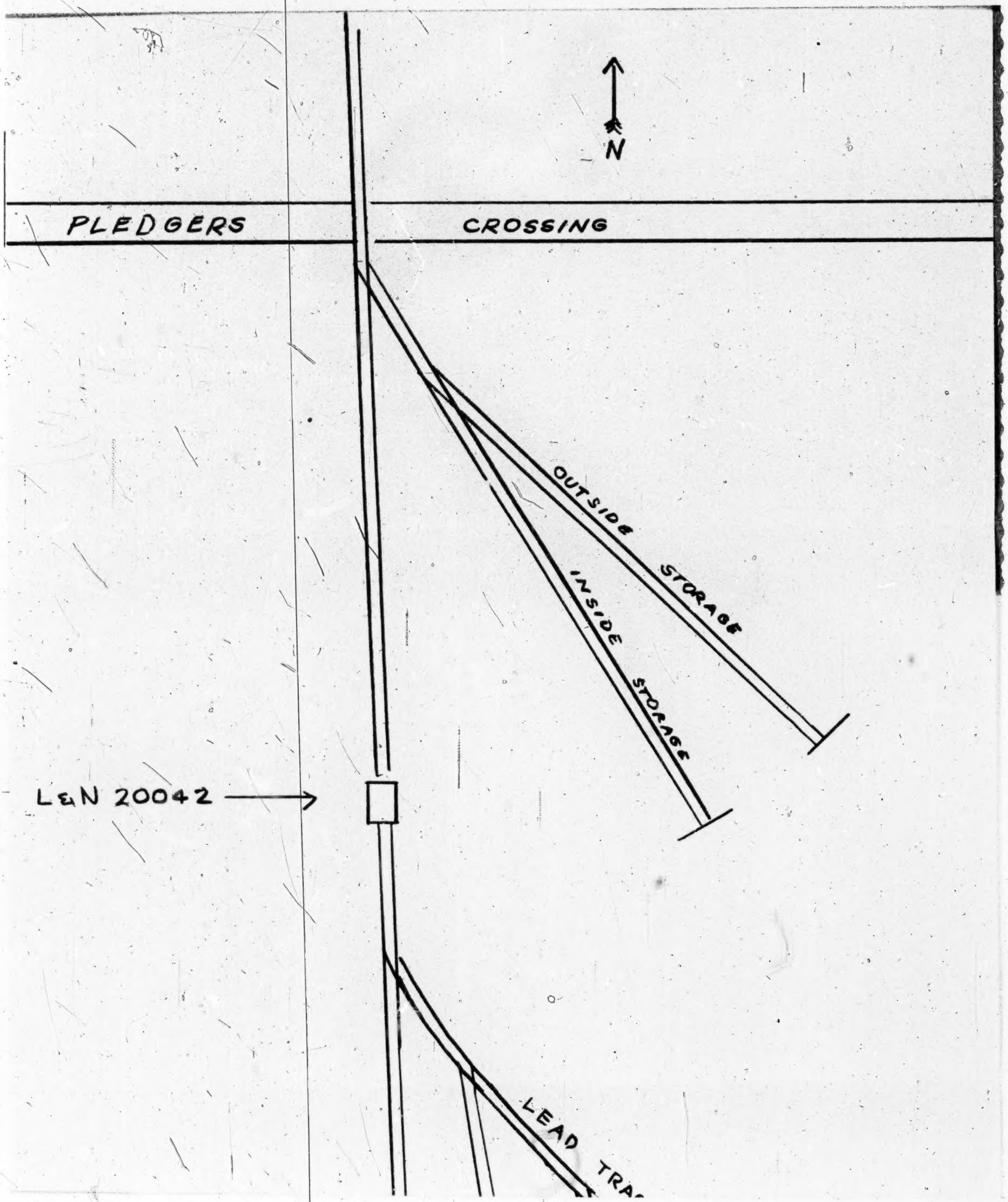
The depositions are marked Plaintiff's Exhibit 2.

MR. PETTUS: By that statement we don't waive our exception as to your Honor's ruling as to your view.

THE COURT: No.

* * * *

Then comes the testimony of MRS. NEROY CARTER, which commences on page 88 of the Record.


N
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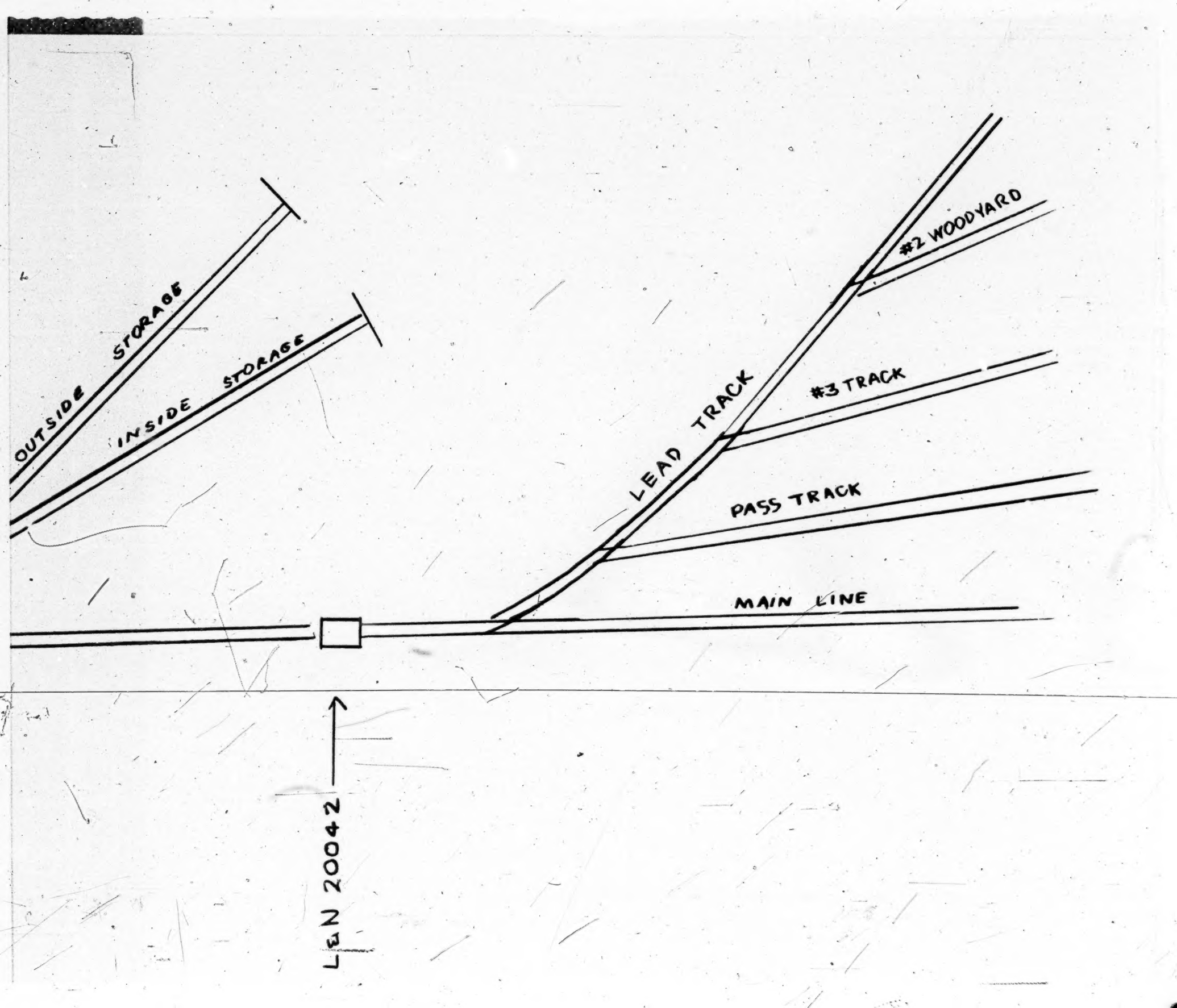
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#3 TRACK
LEAD TRACK
PASS TRACK
MAIN LINE
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1948.~~ 1949

No. ~~565~~ 23

NEROY CARTER,
Petitioner and Appellant Below,

v.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY,
Respondent and Appellee Below.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Atlanta and Saint Andrews Bay Railway Company in Opposition.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 565.

NEROY CARTER,
Petitioner and Appellant Below,

v.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY,
Respondent and Appellee Below.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Atlanta and Saint Andrews Bay Railway Company in Opposition.

The facts of this case are adequately stated in the opinion of the lower court reported in 170 Fed. 2d 719 and shown at page 214 of the record. For this reason we will not burden the court with a further statement of facts. We do wish, however, to (1) correct three statements appearing in the petition for certiorari, (2) to define the single issue in the case, and (3) to list the salient facts in relation to this issue which, as we contend, compelled the judgment below:

(1) CORRECTIONS.

At page 4 of the petition for certiorari appellant states that after the first coupling was attempted but failed Carter signed or signalled the engineer that the car "was

rolling." The record simply does not bear out this statement. On the contrary, the plaintiff's testimony very clearly shows that he never signalled the engineer that the coupling had missed and that the only signal he ever gave was "come ahead." (R., pp. 119, 121, 123, 186 and 187.) In fact his testimony shows he gave the "come ahead" signal twice, once prior to the first attempted coupling and once after it, though in the second case he says he was signalling for the footboard man to come with his lantern. (R., pp. 119, 120 and 121.) He also testified he never gave any other signal. (R., p. 121.)

At page 6 of the petition for certiorari the appellant makes for the first time a contention that the Safety Appliance Act was violated because of defective brakes on L. & N. Car No. 20042. No complaint was made in the petition that the brakes on this car were defective nor was any such contention advanced at the trial. Clearly this point has been raised too late.

At page 7 of the petition for certiorari appellant says that if the engineer had applied the brakes in emergency the train could have been stopped short of the second impact. In support of this statement appellant refers to pages 54, 55 and 145 of the record. We do not wish to quibble with counsel as to what the record shows or to belabor the court with inferences which might be drawn from testimony. We merely submit that the jury has decided this issue against appellant and we say that a fair reading of the cited pages more nearly supports their verdict than it does the statement contained in appellant's petition.

(2) THE ISSUE.

Only a single issue is presented which is of such magnitude, importance or public interest as to conceivably warrant this court in granting certiorari. That is the issue of

the Federal Safety Appliance Act on which the lower court directed a verdict. All other issues were submitted to a jury and were found against appellant. This court has traditionally, and, we think, wisely, declined to review such matters.

(3) THE FACTS WITH RESPECT TO THIS ISSUE.

The following are the salient facts on the issue of the Safety Appliance Act which, as we contend, compelled the judgment below:

(1) Following the failure of the appliance in question and before the injury appellant safely brought the runaway car to rest without hurt or harm to anyone. (R., p. 111—This is also admitted in the original petition. R., p. 3.)

(2) After the failure of the coupling appellant again signalled the engineer to "come ahead" and this signal was received and obeyed. It was the only signal appellant gave. (R., pp. 119, 120, 121, 131.)

(3) Thereafter when the cars came together a second time—and this was the time when appellant was actually injured—the coupling in question functioned perfectly. (R., pp. 64, 124.)

(4) The gist of appellant's petition, as originally filed, was that in coming ahead the second time the engineer came too fast and in violation of a company rule. (It was only by amendment and apparently as an afterthought that the Safety Appliance Act was brought into the case.) These issues were submitted to the jury and were found against appellant.

(5) Appellant himself was in charge of the train. (R., p. 117.)

ARGUMENT.

In his petition for certiorari appellant contends that the lower court's interpretation of the Safety Appliance Act, particularly as applied to the question of proximate cause, is in conflict with three decisions of this court and that for this reason certiorari should be granted. As this issue appears to present the only real question in the case we shall briefly review the factors which clearly make the present case distinguishable.

In the first case cited by appellant,[1] hereinafter called the **Coray** case, a defective appliance caused a moving train to stop suddenly in the path of an on-coming velocipede on which plaintiff was riding. A collision immediately followed. From these facts it is apparent at a glance that there was a direct and foreseeable causal connection between the failure of the appliance and the collision which immediately ensued. From the failure of the appliance the injury was the natural, immediate, and one is tempted to say, inevitable, result. Between the failure of the appliance and the injury there was neither the slightest pause nor the intervention of any other producing cause or stimulus.

In the second case cited by appellant,[2] herein called the **Myers** case, a brakeman was injured when a brake he was tightening "kicked back," throwing him from his car. This court merely held that the failure of the appliance to function properly was sufficient to support a finding that (1) it was defective and, (2), that this defect was the proximate cause of the injury. Here the question of proximate cause was only incidentally involved. In fact a more direct causal connection can hardly be imagined.

---

1 Coray v. Southern Pacific Co., 93 L. ed. 243 (U. S. Supreme Court Law Edition Advance Opinions, Vol. 93—No. 5).

2 Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615.

The real question was whether there was sufficient evidence to show that the appliance was defective. When this was decided in the affirmative liability followed as a matter of course.

In the final case cited by appellant,[3] herein called the **Layton** case, the failure of a coupling set in motion a string of cars on which plaintiff was riding, so that, without pause or intervention, they collided with other cars, causing the injury complained of. Here again, we believe, a direct causal connection is clearly apparent.

From such situations the present case is clearly distinguishable.

In the outset let us freely concede that in the present case the Safety Appliance Act was violated—that a coupling failed to couple on impact; and that from such failure the car in question was set in motion. Let us concede further that up to this point the present case is identical with the **Layton** case and similar in principle to the other cases cited by appellant. And if from the events thus set in motion an injury had ensued we would concede that appellant's cases were controlling. But no such injury did ensue. Instead the moving car was thereafter brought safely to rest. At this point its capacity for doing harm was spent, and it was only the second movement of the train, brought on by appellant's own signal, which started a new chain of events resulting in his injury. Of course, had the coupling failed the second time appellant would have a different case. In the same way had the train been negligently moved the second time appellant might still have recovered on general negligence. But these are not the facts. Appellant himslf admits that in the second movement the coupling functioned perfectly; and on the question of general negligence a jury has found for appel-

3 L. & N. R. R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 455, 61 L. ed. 953.

lee. Thus on the facts actually presented, we submit that the judgment of the Circuit Court was correct, and in fact required, and that for this reason certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 23.

NEROY CARTER,
Appellant,

v.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY,
Appellee.

BRIEF

On Behalf of Appellee Atlanta & Saint Andrews Bay Railway Company.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 23.

NEROY CARTER,
Appellant,

v.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY,
Appellee.

BRIEF

On Behalf of Appellee Atlanta & Saint Andrews Bay Railway Company.

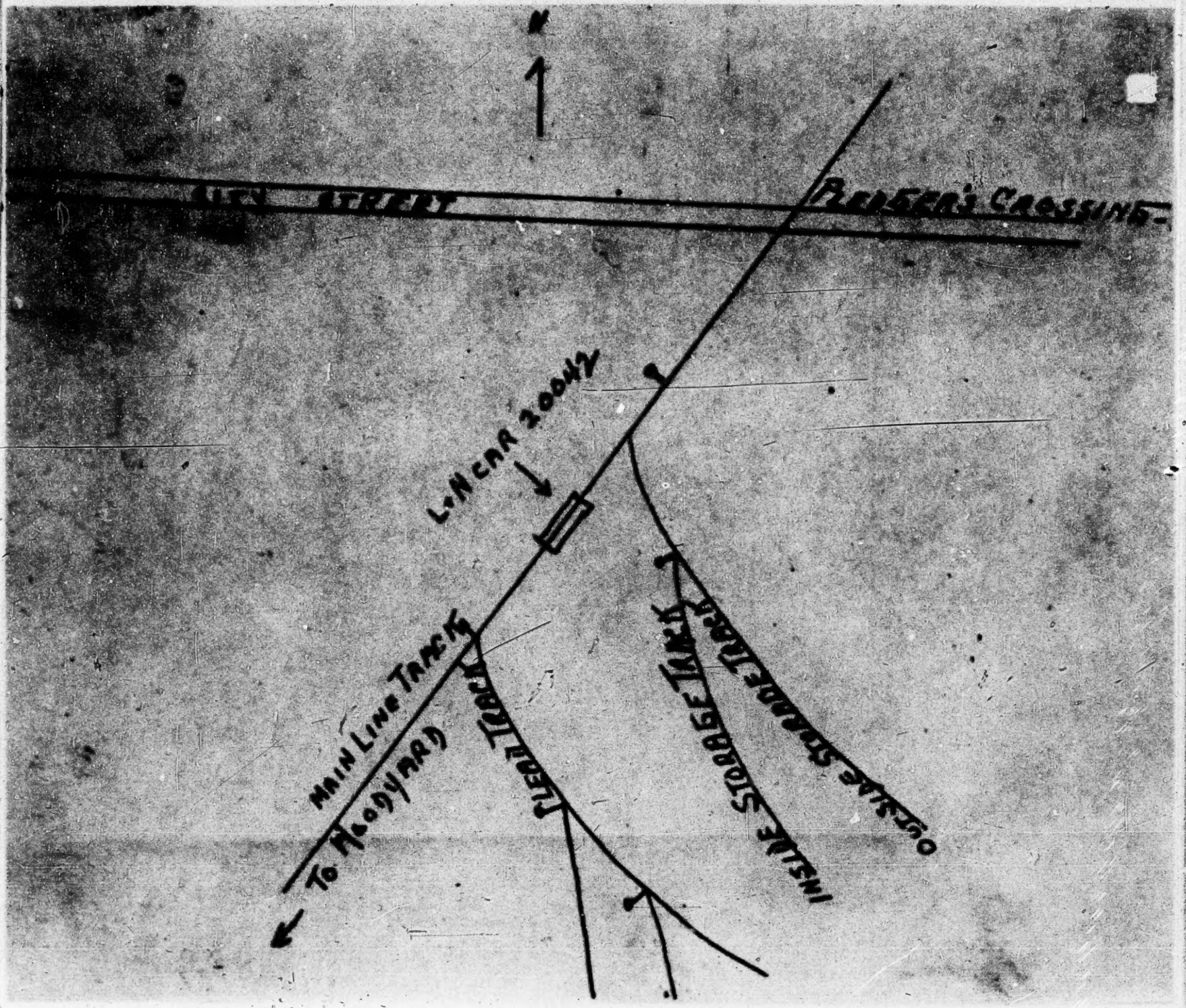
PRELIMINARY STATEMENT.

This Brief on behalf of Appellee is prepared without having received the Brief from Appellant within the time required by the Rules of this Court. Leave is expressly requested to file a supplemental brief after Appellant's Brief has been received.

STATEMENT OF FACTS.

The suit was brought under the Federal Employers' Liability Act. The plaintiff employee was a brakeman employed by defendant and his alleged injuries were suffered during a switching operation at night. We use the term "alleged" injuries advisedly. There was some evidence in the record from which the jury may have found that the plaintiff had no injury at all, but a congenital deformity (R. 104, 107-110). The complaint as originally filed alleged only general negligence, viz., excessive speed (R. 2), but was later amended to allege a violation of the Safety Appliance Act in the form of a defective coupling. At the conclusion of the evidence the trial court instructed the jury that a recovery could not be based on a violation of the Safety Appliance Act for the reason that the injury did not occur at the time the coupling failed. The court then submitted the case to the jury as to general negligence only and the jury returned a verdict for the defendant Railroad. Judgment was entered and later affirmed in the Circuit Court (170 F. 2d 719).

The sequence of switching operations preceding the alleged injury was as follows: Plaintiff was the lead or "'swing" brakeman, and during the time in question was in charge of the train (R. 79-80). The railroad yards included a main line track with multiple sidings. The diagram below, while not drawn to scale, will show the general scene:


N
Elm Street
Peoples Crossing
L-N car 3004
Main Line Tracks
To Hoogland
Fuel Track
Inside Storage Track
Outside Storage Track

At the start of the operation the engine, headed south, was on the main line track between Pledger's Crossing and the storage tracks. It proceeded forward into the inside storage track and picked up a box car. After this, it backed out of the inside storage track until clear of the switch, then proceeded forward into the outside storage track, where it picked up eight wood-rack cars loaded with pulpwood. Finally, it was to back out of the storage track, pulling all nine cars onto the main line, and there proceed south, pushing the cars until a connection was made with L&N Car 20042, shown on diagram, after which the entire cut of ten cars was to be pushed into the wood yard and there placed at various points.

These operations proceeded according to schedule until a coupling was attempted with L&N Car 20042. The plaintiff himself had, prior to the described switching movement, made the preparation for this coupling by "bleeding the air" and setting the brakes on L&N Car 20042 and opening the lips of its coupler. There is evidence in the record that this was done improperly in that plaintiff opened both lips of the coupling (R. 81), whereas good railroad practice required the opening of only one (R. 125). As the engine proceeded south, pushing one box car and eight wood-rack cars ahead of it, plaintiff stood [illegible]n the darkness directing the coupling operation. The p[illegible]intiff gave the engineer a "come ahead" signal to make the coupling to L&N Car 20042, and the cars came in contact but the coupling failed (R. 72, 73). This fact, however, was not known to the engineer and fireman (R. 90, 118). The plaintiff gave no signal that the coupling had failed, and in fact, after it failed and while the train was stopped, gave still another signal to "come ahead" and this was acknowledged by the engineer (R. 82, 93), though in this case plaintiff says he was signalling for the footboard man to come with his lantern (R.

93, 82, 84). In the meantime L&N Car 20042 had commenced to roll and plaintiff started after it on foot. He overtook the car and mounted its bulkhead and tightened its hand brake, bringing it to a halt. Up to this time plaintiff had not been injured. After he had brought the car to a halt and while he was still sitting on its bulkhead, he says he looked up and saw the engine and cut of cars "bearing down on him out of the night". It was in connection with this movement that plaintiff alleged excessive speed on the part of the engineer. The cut of moving cars contacted the stationary L&N Car 20042 a second time, and this time the coupling worked perfectly (R. 85). At the time of this second coupling, however, plaintiff says that he braced himself for the impact but was unable to maintain his balance and fell to the floor of the car, where the alleged injury occurred.

ARGUMENT.

I. The Allegations of General Negligence.

The only allegation of general negligence contained in the complaint is a charge that the engineer, at the time of the second coupling, was moving the train at an excessive rate of speed. The evidence on this issue was in dispute. The question was submitted to a jury who have resolved it in favor of the Railroad. There is ample evidence to support this verdict. This Court does not ordinarily concern itself with questions regarding the weight of the evidence and any exception based on the allegation of general negligence is clearly without merit.

II. The Issue as to the Safety Appliance Act.

The first issue presented with respect to the Safety Appliance Act is the question whether the coupling in question was defective. The burden of proving this issue, of course, rests with the plaintiff, and since this is the fact upon which the application of the Act depends, the proof on this question should be clear and unequivocal.

In the case of **Myers v. Reading Co., 311 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615**, this Court held that an appliance may be shown to be defective in either of two ways, (1) by "evidence . . . to establish some particular defect," or (2) "by showing a failure to function when properly operated with due care in the normal, natural and usual manner" (citing **Didinger v. Pennsylvania R. R. Co., 39 F. 2d 798-799**).

In the present case, the first of these methods of proof was not even attempted. The plaintiff not only failed to

prove any specific defect but the company, in rebuttal, affirmatively proved that the coupling was subsequently inspected and no defect found (R. 112-116). Plaintiff himself admitted "It had been coupling" (R. 82).

Nor did plaintiff sustain the bu.den of proof as required by the second method. It is true that he proved the coupling failed on one occasion. In fact, he at first contended that it failed several times, but on cross-examination he later took this back (R. 76). But mere proof that the coupling failed to work on one occasion is not all that **Myers v. Reading Co.** requires. The requirement is that plaintiff show that it failed **when properly operated with due care in the normal, natural and usual manner.** The Court will recall, of course, that plaintiff himself had prepared this coupling before its failure, and that other evidence tended to show it failed to work not because of a defect, but because he set it wrong. Plaintiff admitted, for example, that he opened both lips of the coupling, when the record clearly shows that better railroad practice requires the opening of only one, since if two are opened two pins must fall instead of one (R. 112-116). When questioned about this, plaintiff's answers were equivocal. On page 81 of the record, after admitting that he had opened both knuckles, plaintiff was asked:

"Q. Don't you know, as a matter of fact, a coupling can be made much better with just one open?

A. Well, I don't know.

Q. I ask you, as a matter of common knowledge, don't you know a coupling will be made better if one is open and set on that coupling?

A. That is not a fact of common knowledge. Two opened.

Q. Open both of them?

A. Yes, sir."

In another place (R. 77) plaintiff was asked whether in setting the car, bleeding the air and setting the brakes he had done everything he should have done, to which he responded "Yes." It is apparent, however, from reading the context that at this point plaintiff was testifying, not that he had done everything properly, but merely that each of these items was included in what he had done. This, of course, is quite different from testimony that each had been done properly. From this testimony it is apparent that plaintiff was uncertain whether to admit he set the coupling improperly or whether to deny it unequivocally. First, he said he did not know what was the better practice. Thereafter, all he testified was that, if better operating practice required the opening of only one knuckle, this was not a fact of common knowledge (R. 125). Now let us turn to the other evidence on this subject. Mr. Nichols, the defendant's General Superintendent, testified as follows:

"Q. Are you familiar with the manner of coupling a car of the type involved in this series, such as car 20042, involved in this case?

A. I am.

Q. I will ask you if, in common railroad practice and procedure, a man attempting to make a coupling is it best to open one knuckle or both knuckles?

A. One.

(Objection.)

The Court: You are familiar with the mechanism of these automatic couplers?

Witness: Yes, sir.

The Court: And you testify, as I understand it, they are more likely to make, with one open, than two?

Witness: Yes, sir.

The Court: Two would diminish the likelihood of making a proper coupling?

Witness: Yes, sir. Two pins would have to fall instead of one."

Nowhere was this testimonly contradicted or rebutted, and in the light of it we respectfully submit that the plaintiff failed to carry the burden of proving the coupling was defective. We think the cases so hold.

It is interesting, for example, that in **Myers v. Reading Co.**, supra, holding that an appliance can be proved defective by showing it failed to work, the court cited the case of **Didinger v. Pennsylvania R. R. Co., 39 F. 2d 798-799.** That case presents quite an interesting and different record. In the district court the case went off on a directed verdict based on the plaintiff's opening statement, but this was reversed in the Circuit Court of Appeals. There the plaintiff offered to prove "that the brake was set 'in accordance with the proper and usual manner of setting the brake and it gave away and did not hold.'" The court also referred to "the frequently repeated assertion that the brake had been properly set" and then said:

> "**Assuming the proper setting of the brake,** the fact that it did not hold demonstrates its inefficiency . . . the principle of res ipsa loquitur applies. The failure to hold under normal operation speaks for itself." (Emphasis ours.)

Furthermore, in this case the court anticipated that a defendant might rebut evidence that an appliance was defective by showing it was set wrong. In reversing the lower court and holding that the plaintiff's opening statement made out a case for the jury, the court said:

> "It is possible that, upon hearing, the defendant might have met the showing of inefficiency by evidence that the brake equipment was in good order,

> or by other evidence tending to show that the accident happened through the manner of handling. This, however, does not appear from the opening statement, upon which we are of the opinion the court should not have directed a verdict."

In the present case that very thing happened. The case went to trial and the defendant did in fact rebut the showing of inefficiency by evidence tending to show that its failure to work resulted not from a defect but from the way it was set by plaintiff.

It is also interesting to note that the **Didinger** case in turn cites the case of **Burnett v. Pennsylvania R. R., 33 F. 2d 579.** In this case the plaintiff alleged a defective hand brake the only evidence of which was that it failed to work. Other evidence tended to show that the failure might have been due to the fact that plaintiff himself had wound the brake too tight. In directing a verdict for defendant under these circumstances, the Court said (at p. 580):

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such case there is no question for the jury."

For these reasons we respectfully submit that the plaintiff failed to carry the burden of proving the appliance defective.

The second question presented with respect to the Safety Appliance Act is whether, assuming the appliance was defective, such defect was the proximate cause of plaintiff's injuries. The Court will recall, of course, that the coupling did not fail at the time of plaintiff's fall; the

complaint is that it failed on a previous occasion. The Court will also recall that after this previous failure and before the injury both the runaway car and the train had come to a stop, and that it was plaintiff himself who had again signalled the train ahead (R. 75, 82, 84, 93). Based on these facts and in the light of several earlier decisions of this Court and the Circuit Courts of Appeal[1] we were prepared to argue here, and did argue in the court below, that even if the coupler was proved defective, still it did not proximately cause the plaintiff's injuries but only created a "condition upon which plaintiff's negligence operated." In short, to paraphrase Mr. Justice Black, we were prepared to distinguish "cause in the philosophic sense" from "proximate cause" in the legal sense. In **Coray v. Southern Pacific Co.**,[2] however, decided at the last term, this Court suggested that such an argument was a mere "dialectical subtlety" which could serve no useful interpretive purpose.

Now at the outset let us say that we have no quarrel with the result reached in **Coray v. Southern Pacific Co.** and that we agree that it was properly decided on its facts. We do feel, however, that in spite of some of its language it was never intended by the Court to apply to such a situation as is here presented. At one fell swoop the language of the **Coray** decision would seem to abolish all distinctions between proximate causes and those remote causes which have heretofore been called only conditions, and to fix an inviolable rule that if a defective appliance "contributes" in whole or in part, directly or indirectly, to an employee's injury, "the railroad must pay damages." Frankly, if this language is to be literally

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1 Cf. St. Louis R. R. Co. v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. Ed. 1290; Lang v. N. Y. Central R. R., 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; Reetz v. Chicago etc. R. R., 46 F. 2d 50.

2 ... U. S. ..., 69 S. Ct. 275, ... L. Ed. ...

applied, **Coray v. Southern Pacific** has made some new law. It has not only abolished the distinction between causes and conditions, but has destroyed the whole requirement of proximate cause as well. In such case, all that is necessary for a recovery is to show that the failure of an appliance, occurring sometime in the past, has "contributed" to a situation in which some injury has occurred. If this is the law it is entirely new, for not even the compensation acts have gone this far. Suppose, for example, that an employee's job has kept him overtime and made him catch a late train which happens to be wrecked, causing him to be injured. An Industrial Board would clearly hold that such an injury was not compensable because it did not arise out of and in the course of the employment. And yet, in a very real sense, the employment has "contributed" to the injury, at least in part, since it caused the employee to be where he was and without it the injury could never have occurred. In short, the employment has created the "condition" in which the injury was to happen. Or, suppose an employee's work carries him to a certain location where he is struck by lightning. Here again the same distinction would prevent recovery; the work did not "cause" the injury—it merely made it possible. By the clearest principles neither of these cases would be compensable. **And yet, under the language used in Coray v. Southern Pacific, if carried to its logical conclusion, each would be actionable if a defective appliance "contributed" to the injury by causing the employee to be where he was.** Frankly we cannot believe the Court intended to go so far.

The question, therefore, in the light of **Coray v. Southern Pacific,** is not so much whether the Court will continue to distinguish between proximate and remote causes —of this we feel confident—but, rather, where the Court will now draw the line. Furthermore, we think the present

case presents an admirable opportunity for the Court to make the new line of demarcation clear. We think the basis of distinction should be that when, following the failure of an appliance, matters have been brought safely to rest without injury, the evil propensities of that particular failure are legally at an end. If this distinction is made the correctness of the present decision is clear. In this case an appliance failed, not at the time of the injury, but before. After it failed all of the factors present, both the train and the runaway car, were safely brought to rest. Following this, and apparently because of plaintiff's own signal, the train moved forward again and the cars collided a second time, causing the injury. We submit that in such a case the sole cause of the injury was the subsequent movement of the train, and as this was brought about not by a defective coupling, but by plaintiff's second signal to "come ahead", we say the Safety Appliance Act had nothing to do with it.

Manifestly there is a distinction between these facts and those in the **Coray** case. Suppose, for example, in the **Coray** case, that after the defective appliance had stopped the train the velocipede had been brought to a stop also, so that matters had come to rest in apparent safety, and that thereafter plaintiff had again started his velocipede and crashed into the standing cars. In such event the defective appliance would still have "contributed" to the injury, since it caused the train to be where it was. We doubt, however, that the decision of the Court would have been the same had these facts been presented. We think this case presents that distinction.

Nor does this distinction do violence to the rule that contributory negligence is no defense. True, this Court could very well find under the facts of this case that the plaintiff's negligence in signalling the train to "come

ahead" after the appliance failed was not merely contributory, but was in fact the sole proximate cause of his injuries. But the movement of the train, as an effective intervening cause, does not depend on whether plaintiff was negligent at all. The intervention of the moving train was a fact which came on the scene for an independent reason and after the appliance failed, and it was no less an intervening factor whether its movement was caused by negligence or otherwise. In fact, its intervening character would be the same, so far as concerns the Safety Appliance Act, even if the movement of the train was brought about by the negligence of the railroad. In this event, while plaintiff could recover, his recovery would be under the Federal Employers' Liability Act alone, not under the Safety Appliance Act. This theory, of course, was submitted to the jury and has been found in favor of the defendant.

For the above reasons we respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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I, James N. Frazer, of counsel for the appellee in this case, do hereby certify that I have mailed copies of the above and foregoing brief to Hon. J. Kirkman Jackson and Hon. Erle Pettus, 818 Massey Building, Birmingham 3, Alabama, on this ... day of October, 1949, both attorneys of record for the appellant.

James N. Frazer.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 23.

NEROY CARTER,
Appellant,

v.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF

On Behalf of Appellee, Atlanta & Saint Andrews Bay Railway Company.

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PRELIMINARY STATEMENT.

Our original brief was filed without having received a brief from opposing counsel and without any knowledge of what contentions would be urged by plaintiff on final argument. At the time the original brief was filed we expressly requested leave to file a supplemental brief at a later time. The present brief is submitted pursuant to that request.

ARGUMENT.

I. The Issue as to the Safety Appliance Act.

At the outset let us define the scope of this issue. Counsel for plaintiff have sought to inject into this case a contention that L. & N. Car 20042 violated the Safety Appliance Act not only by having a defective coupler but also by having a defective automatic brake. Such contention is not only unsound but in fact is not even properly before this Court. In the first place, the Safety Appliance Act does not require automatic brakes on each individual car, such brakes being required only when several cars are coupled together to form a train (45 U. S. C. A. §§ 9, 11). During the period here involved L. & N. Car 20042 was never so coupled. In the second place, no allegation of a defective brake is contained in plaintiff's petition, and of course, having failed to make this point before the trial court, it is too late for plaintiff to raise it here.

We go then to the question of the defective coupling. We believe our original brief sufficiently demonstrates that in this respect the Safety Appliance Act was not violated in this case. Not only was there no direct evidence showing that the coupler was defective, but the circumstantial evidence actually adduced points at least equally to the hypothesis that plaintiff himself had set it wrong. However, as we pointed out in our brief on certiorari and again on oral argument, it is not necessary for the Court to decide this question in this case; for in this case even if the appliance was defective its failure was not the proximate cause of plaintiff's injury. On the contrary the cause, and the sole cause, of plaintiff's fall was the second movement of the train in connection with which plaintiff says the engine was moving too fast. This issue was submitted to the jury, who have found for the railroad.

All that remains, therefore, is to discuss the case of **L. & N. v. Layton,**[1] which is most strongly relied on by the plaintiff. In the first place, the **Layton** case is not in point here for the simple reason that it did not involve the question of proximate cause at all. The real point involved in the Layton case was whether the provision of the Safety Appliance Act relating to automatic couplers was intended only for the benefit of employees injured when between the cars for the purpose of coupling or uncoupling them. The whole pressure of the case was upon that point. The opinion holds this contention of the railway company was not sound, and that is all it holds.

Furthermore, the **Layton** case presents an altogether different set of facts, and while it bears some superficial resemblance to the present case in a factual sense, from a causal point of view it is altogether different. In the **Layton** case the failure of a coupling set in motion a string of cars on which plaintiff was riding. The cars thus set in motion continued to roll without stopping until they struck other cars, throwing plaintiff to the ground. Between the failure of the coupling and the resulting injury there was neither pause nor intervening movement. The movement in the course of which the injury occurred was the very same movement which the defective coupling started. There was no second movement of the engine, as in the present case, nor were the rolling cars ever brought to rest before the injury occurred. Any resemblance, therefore, between the present case and the **Layton** case is purely superficial. The most that can be said in comparing the two cases is that in each case the failure of a coupling set a car in motion and in each case an injury occurred in a second collision which followed. But the vital point of distinction lies in the answer to the question, **what caused the second collision?** In the **Layton**

1 243 U. S. 617, 37 S. Ct. 455, 61 L. Ed. 931.

case the second collision (and therefore the injury) was caused by the defective coupling. This is patently true because the defective coupling started the very movement in the course of which the second collision and the injury occurred. In the present case, on the other hand, all the failure of the coupling did was start the car to roll. But it was not in the course of this movement that the injury and second collision ensued. In fact, in the present case the rolling car was thereafter brought to rest and it was only a new factor in the form of the moving engine which made the second collision and the injury possible. It follows, therefore, that since in the present case the movement of the engine was the producing cause, and since the engine's movement was caused not by the failure of the coupling but by plaintiff's own signal, the defective coupling had nothing to do with either the second collision or the plaintiff's fall. These facts clearly differentiate the **Layton** case.

II. The Charge of the Court.

In his petition for certiorari plaintiff also makes several complaints based on the charge of the court on the question of proximate cause. Frankly, we find these assignments quite difficult to argue for the simple reason that they raise no issues requiring a reply. The main complaint of the plaintiff seems to be that in the course of the charge the court referred to the question of proximate cause on six separate occasions. But so long as his charge was fair—so long as it gave no advantage to either party—we can see no basis for objection to it on this ground. If the charge was impartial and if the Judge considered this the vital element of the case, we fail to see how the plaintiff could be harmed had he mentioned it a dozen times. Furthermore, we think that in the first part of this brief we have demonstrated that the question of proximate

cause was the vital issue in the case, and if this is true the Court was of course justified in emphasizing this fact. Plaintiff himself admits that one of these references was given upon his own request and we think that the Judge's further explanation at this point was proper and that it represented a correct statement of the law.

Moreover, at least two of the excerpts of which the plaintiff complains were given not on the question of proximate cause, but on the question of damages, and were absolutely necessary if the jury was to make any intelligent determination of the case. The plaintiff has merely torn these excerpts from their context and made it appear they were given on the question of proximate cause when, if taken in their proper place, they clearly indicate that the Judge was charging the measure of damages in the event the jury found for plaintiff. Thus at page 17 of plaintiff's petition he complains of the following portion of the charge:

> "If you find for the plaintiff, and find that he was not negligent in any manner, and that his injury was entirely the proximate result of the negligence of the engineer or some of the other employees at that time, then you would award such measure of damages as in your judgment would reasonably compensate him for the injury that he had suffered."

Thereafter the court immediately charged that if on the contrary the jury found that both parties were negligent then they should weigh one against the other and do what they thought was right in the way of damages, according to the evidence and rules of law previously given in charge. At still another place he charged that plaintiff could not recover at all if he were wholly to blame.

These charges of course relate not to proximate cause but to damages. If the jury was to reach any intelligent

verdict in this case it was necessary that they be charged a different measure of damages for each of three different situations, any one of which the jury might have found to exist, viz.: (1) the measure of damages if the plaintiff were guilty of no negligence and the defendant were entirely to blame; (2) the measure of damages if both parties were partly to blame; and (3) the measure of damages if the negligence of plaintiff were the sole proximate cause.

It is clear from reading the charge as a whole that what the court intended was to differentiate these situations and that the Judge properly stated the rule and that the jury could not possibly have been misled.

Finally, if there were any doubt as to the propriety of the Judge's charge on the issue of proximate cause, such doubt was clearly resolved by the plaintiff's oral objection at the time the charge was given and the Judge's corrective remarks made to the jury in response thereto. It is difficult to overestimate the effect of these remarks on the jury. If plaintiff's counsel himself had charged the jury he could have done no better. Here the plaintiff's counsel first announced to the court what his objections to the charge were and told the court what he wanted charged, whereupon the court said, "I will modify it to that extent", and then proceeded to further charge the jury in almost identical language the very thing the plaintiff had requested. Of course the plaintiff's final complaint that in making these corrective remarks the court used the words "wholly responsible" instead of the words "solely responsible" is pure quibbling and could have had no possible effect upon the verdict.

The above, we believe, takes care of all contentions as to the Safety Appliance Act and the charge of the court. The remaining issues raised by the plaintiff concerning the company rule, the speed of the train, and the alleged

delay of the engineer in applying his brakes have been submitted to a jury and found for the railroad. There is ample evidence to support their verdict and we respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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I, James N. Frazer, of counsel for the appellee in this case, do hereby certify that I have mailed copies of the above and foregoing brief to Hon. J. Kirkman Jackson and Hon. Erle Pettus, 818 Massey Building, Birmingham 3, Alabama, on this 27th day of October, 1949, both attorneys of record for the appellant.

James N. Frazer.